PRINCIPLES

OF

PENAL LAW.

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MVSEVM
BRITAN
NICVM

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PRINCIPLES

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CHAP. I.

Of the Origin of Legiſlation.

§. 1. IN the formation of ſocieties mutual utility is the inſtinctive principle of union. But reaſon co-operating with inſtinct carries the aſſociation ſtill further, and points out the inſufficiency of a ſyſtem merely gregarious. The unlimited enjoyments of Individuals are found incompatible with the exiſtence of a collective Body; rules of conduct and covenants are introduced; and the moral duties of benevolence, juſtice, and adherence to compacts, become as evident to human underſtanding, as they are eſſential to human happineſs.

Here then commences the obligation of civil laws: The impulſes of appetite ceaſe to be the ſole motives of action; power is no longer the meaſure of property; and the natural herd is refined into a political ſtate. Legiſlation is inſtituted; and the baneful exceſſes of the paſſions are ſubjected to various modifications of reſtraint. Magiſtracies are eſtabliſhed; and the promulgation of puniſhments is extended to All, by the common conſent of All, for the benefit of All.

And thus it is, that civil liberty is the aggregate of thoſe portions of natural liberty, which are given up by the conſtituent members of ſociety. But it is not to be ſuppoſed, that this effect is inſtantaneous: I ſhall hereafter have occaſion to ſhew, that the infancy of civilization is tedious, and its progreſs towards maturity ſubjected to many difficulties. The gratification of private reſentment, and the purſuit of private ſatisfaction are at firſt the ſole objects of criminal proceſs; and the offended party is his own avenger. It is long before the ſelfiſh paſſions are ſoftened into an habitual acquieſcence in the general diſpenſations of Law; before injuries to individuals are conſidered, and made puniſhable, as in-

juries

juries to the ſociety at large. This change, in which the public intereſt is recognized to be the great end of penal juriſdiction, tho' founded in reaſon, is contradictory to the moſt active propenſities of human nature, and therefore is ſubmitted to with reluctance.

It is from this aſſumed period of perfect civilization that I am now to proceed.

§. 2. To what extent the authority of legiſlative regulations may be carried, and how far the obedience of the ſubject is demandable, are queſtions of ſpeculation, which the temperate diſpoſition of modern governments hath rendered rather curious than uſeful. It is ſufficient to obſerve, that every cauſeleſs or unneceſſary reſtraint of the Will is an infringement of that political freedom, to which every member of ſociety is entitled; and poſſible caſes may certainly be propoſed, which no authority on earth can juſtify.

[a] *Phalaris licit imperet, ut ſis*
Falſus, et admoto dictet perjuria tauro,
Summum crede nefas animam præferre pudori,
Et propter vitam vivendi perdere cauſas.

[a] Juv. viii. 81.

The accompliſhed Athenians enacted, that in Sieges the aged and infirm ſhould be put to death: an Engliſhman would not think himſelf compellable by any Law to plunge the poniard into the boſom of his helpleſs Father. The ſame Athenians in the height of the moſt refined effeminacy conſidered the Expoſition of their children as a practice juſtifiable, and blameleſs; and Solon, the moſt celebrated of the Sages of Greece, gave it the ſacred permiſſion of law. Among the Spartans this unnatural ſpecies of murder was conducted by a ſtate-committee, appointed to determine, whether the child were proper to be reared, as likely to become uſeful to the community; or to be deſerted, as of an infirm, and unpromiſing conſtitution. Vain were the ſmiles of innocence, and the cries of helpleſſneſs. [b] Cuſtom had murdered natural affection; and the

[b] The force of habitual prejudices is wonderful; a truth, which will frequently recur to the Reader in the courſe of the following enquiry. Plutarch, the humane, good natured Plutarch, recommends it as a virtue in Attalus, that he expoſed all his own children, in order to leave the crown to the ſon of his brother Eumenes; ſignalizing in this manner his gratitude and affection to Eumenes, who had left him his heir in preference to that ſon.

Perhaps (ſays Mr. Hume) by an odd connection of cauſes, this barbarous cuſtom might contribute to render thoſe times more populous. By removing the terrors of too numerous a family it would engage many people in marriage;

Babe was abandoned by its Parents to the Mercy of Wolves and Bears. The hearts of modern mothers bleed at the idea.

§. 3. As to the more confined queſtion, to what degree puniſhments may be carried; or how far a Man may ſubject himſelf and his fellow-citizens to the infliction of pains, the loſs of honors and property, the horrors of impriſonment, and the deprivation of life; the anſwer may in ſome meaſure be collected from thoſe writings of Divine authority, to which I ſhall hereafter refer: At preſent it may be ſufficient to appeal to the unwritten law of God imprinted on the heart of Man; to that natural ſympathy better felt than expreſſed, which forbids us to give unneceſſary Pain to each other; or in fuller words, to extend the ſeverity of puniſhments beyond what is eſſentially neceſſary to the preſervation and morality of ſociety; general terms, of which a definition will reſult from the ſubſequent detail.

marriage; and ſuch is the force of natural affection, that very few in compariſon would have reſolution enough, when it came to the point, to carry into execution their former intentions. China, where this practice ſtill prevails, is the moſt populous country that we know.

Eſſays 4to p. 218.

State-puniſhments are to be conſidered then as founded on, and limited by, firſt, natural Juſtice; ſecondly, public Utility: and it will be ſhewn, that, in the purſuit of thoſe great ends, Wiſdom and Mercy ſhould go hand in hand.

CHAP. II.

Of penal Laws.

§. 1. THE prevention of crimes ſhould be the great object of the Law-giver; whoſe duty it is, to have a ſevere eye upon the offence, but a merciful inclination towards the offender. It is from an abuſe of language, that we apply the word "puniſh-"ment" to human inſtitutions: Vengeance belongeth not to man. Criminals, ſaid Plato [c], are puniſhed, not becauſe they have offended, for what is done can never be undone; but that for the future the criminals themſelves, and ſuch as ſee their puniſhment, may take warning, and learn to ſhun the allurements of vice. "Meti Suffeti, inquit Tullus, ſi ipſe "diſcere poſſes foedera ac fidem ſervare, vivo

[c] De Legibus 11. pa. 977. [d] Liv. Hiſt. L. 1. ca. 28.

"tibi

" tibi ea diſciplina a me adhibita eſſet: nunc, " *quoniam tuum inſanabile ingenium eſt, Tu* " *tuo ſupplicio doce humanum genus ea ſancta* " *credere, quæ a te violata ſunt.*" It is the end then of penal laws to deter, not to puniſh.

§. 2. But let not for this purpoſe the ſeverity of the penalty be augmented in proportion to the increaſe of the temptation; which is a cruel and miſtaken policy.

" *Qui vi rapuit, fur improbior videtur*[d]." Such was the maxim of the Roman law, which puniſhed the open, daring thief with whipping, and the pilferer by fine only. The Engliſh law, adopting a leſs equitable idea, hath made it death [e] to take privately from the pocket a hankerchief, or other thing of the value of twelvepence; but any Larceny (below the degree of robbery by putting in fear) committed openly, and avowedly on the perſon, to any extent, and even in a dwelling-houſe or out-houſe, under the value of forty ſhillings, is [f] within the benefit of clergy.

[d] Ff. 4. 2. 14. 12.

[e] 8. Eliz. ch. 4.

[f] 1 Hawk. P. C. pa. 97.

Under the ſame perverſion of diſtributive juſtice it is made [h] only a tranſportable offence, " to aſſault another with an offenſive weapon, or by menaces, demanding money, goods, or chattels, with a felonious intent to rob": whereas by another [i] act it is death without benefit of clergy, merely " to write an anonymous Letter, ſigned with a fictitious name, demanding money, veniſon, or other valuable thing".

§. 3. The puniſhment ſhould be proportioned to the flagitiouſneſs of the crime; but the flagitiouſneſs of the crime diminiſhes in proportion to the facility, with which it may be committed *.

Were I to leave the ſupport of this poſition to the internal evidence of its own truth, or to the mere unaſſiſted dictates of moral ſentiment, it might appear perhaps preſumptuous; becauſe contradictory to the moſt ingenious and elegant writer on the law of England.

[h] 7. Geo. ii. ch. 21. [i] 9. Geo. i. ch. 22.

* C'eſt le triomphe de la Liberté, lorſque les loix criminelles tirent chaque peine de la nature du crime: Tout l'arbitraire ceſſe; la peine ne deſcend point du caprice du legiſlateur, mais de la nature de la choſe; et ce n'eſt pas l'homme qui fait violence à l'homme.

L'Eſprit des Loix 12. 4.

" The

" The ſeverity of our law in certain inſtances (ſays that [k] writer) ſeems to be owing to the eaſe with which ſuch offences are committed." Again [l]—" It is but reaſonable, " that, among crimes of equal malignity, " thoſe ſhould be moſt ſeverely puniſhed, " which a man has the moſt frequent, and " eaſy opportunities of committing; which " cannot be ſo eaſily guarded againſt as others; " and which therefore the offender has the " ſtrongeſt inducement to commit: accord- " ing to what Cicero obſerves, [m] *ea ſunt* " *animadvertenda peccata maximé, quæ diffi-* " *cillimé præcaventur*". He then proceeds to ſeveral Examples, on which it may be ſufficient to obſerve, that when " it is made capital for a ſervant to rob his maſter" in certain caſes, which extend not to a ſtranger committing the ſame offence againſt indifferent perſons; and, when " it is a ſpecies of treaſon for a ſervant to kill his maſter, or for a wife to kill her huſband, which act in others is only murder;" we are not in thoſe caſes to ſuppoſe the frequent opportunities of perpe-

[k] See the Commentaries on the Laws of England, B. 4. pa. 241.

[l] Ib. B. 4. pa. 16.

[m] Orat. pro. Sexto Roſcio, ca. 40.

trating

trating the offence to have excited the peculiar ſeverity of the law. The Malignity of the fact is the true meaſure of the penalty; and that malignity is in theſe caſes aggravated by the groſs breach and flagrant abuſe of domeſtic confidence [n]. Cicero has certainly ſaid, *quod ea ſunt animadvertenda peccata maxime, quæ difficillime præcaventur:* but the learned Commentator ſhould have cited alſo the context, which ſupports the very principle for which I contend; "*ad cujus enim fidem* "*aliquis confugiet, cum per ejus fidem læ-* "*ditur cui ſe commiſerit? tecti eſſe ad alienos* "*poſſumus, ſocium cavere qui poſſumus? quem* "*etiam ſi metuimus, jus officii lædimus: recte* "*igitur majores eum, qui ſocium fefelliſſet, &c.*

§. 4. It is one of the unavoidable imperfections of legiſlatures, that they are neceſſitated to aſſign the ſame name and penalty to whole claſſes of crimes, each of which differs

[n] Upon this principle, by a declaration of Lewis the XVth. A. D. 1724, Le vol domeſtique ſera puni de mort. This was only the renewal of a very ancient Law made by Lewis the IXth. A. D. 1270, which conſiders this offence as a ſpecies of treaſon. "Hons, quand il emble a ſon Saignour, et il eſt à ſon pain et à ſon viu, il eſt pendable; *car c'eſt maniere de trahiſon.*

Code penal. p. 103.

from

from the other by an infinite variety of unſearchable circumſtances. Yet ſome offences are ſo intimately, and ſo undiſtinguiſhably claſſed in their nature, that it is difficult to conceive any poſſible reaſon for a diverſity in their puniſhment.

It ſeems a ſtrange incongruity, that the offence of counterfeiting foreign coin legitimated by proclamation, ſhould work [o] a corruption of blood; which is ſaved [p] by ſpecial proviſo in the offence of counterfeiting the current coin of the kingdom. Again it is a clergeable felony by our law to deſtroy or damage the bridges of Brentford or Blackfryars: But it is death to commit the ſame offence on the bridges of London, Weſtminſter, or Putney. There is a ſimilar unaccountable diſtinction between priſon-breakers convicted of [q] perjury, or committed for [r] entering black-lead mines with intent to ſteal; and ſuch as are convicted of, or committed for any other offence within clergy. God forbid, that I ſhould inſinuate a neceſſity to

[o] Foſter pa. 226.
[p] 5. Eliz. ca. 11. and 8. & 9. W. iii. ca. 26, &c.
[q] 2. Geo. ii. c. 25. §. 2.
[r] 25. Geo. ii. c. 10.

drag

drag all this variety of different inſtances to the ſame bloody line of uniformity. Their cruelty appears to me equal to their inconſiſtency; and it would not perhaps be difficult to prove their folly equal to their cruelty.

§. 5. Lenity ſhould be the guardian of moderate governments: Severe penalties, the inſtruments of deſpotiſm, may give a ſudden check to temporary evils; but they have a tendency to extend themſelves to every claſs of crimes, and their frequency hardens the ſentiment of the people. *Une loi rigoureuſe produit des crimes.* The exceſs of the penalty flatters the imagination with the hope of impunity, and thus becomes an advocate with the offender for the commiſſion of the offence.

The convicts, who have ſtolen [s] cloth from the tenters, fuſtian [t] from the bleaching grounds, or a lamb from their landlord's paſture, knew the law to have aſſigned death, without the benefit of clergy, to each of their offences: but in the depth of ignorance, and profligacy, mere inſtinct informed them,

[s] 22. Car. ii. ca. 25. §. 3.
[t] 4. Geo. ii. c. 16. and 18. Geo. ii. c. 19.

that

that common humanity would recoil at the idea, and they relied for their ſecurity on the ingenuity of mercy to evade the law.

§. 6. Legiſlators ſhould then remember, that the acerbity of juſtice deadens its execution; and that the increaſe of human corruptions proceeds, not from the moderation of puniſhments, but from the impunity of criminals.

§. 7. In the promulgation of every new offence, let the lawgiver expoſe himſelf to feel what wretches feel; and let him not ſeem to bear hardeſt on thoſe crimes, which, in his elevated ſtation, he is leaſt likely to commit. " [a] Si les ſupplices en uſage dans " preſque tout l'orient ſont horreur a l'huma- " nité, c'eſt que le Déſpote, qui les ordonne, " ſe ſent au deſſus des loix. Il n'en eſt pas " ainſi dans les republiques; les loix ſont tou- " jours douces, parce que celui qui les établit, " ſ'y ſoumet. If this reaſoning be founded in truth, it furniſhes a mortifying inference, that men are naturally cruel, when they can be ſo with ſafety.

[a] De l' Eſprit. I. 2.—pa. 68.

§. 8. Penal

§. 8. Penal laws are to check the arm of wickedneſs; but not to wage war with the natural ſentiments of the heart.

Contrary to this principle is the * ſtatute, which, making the concealment of infamy undeniable evidence of murder, compels unhappy women to break through the becoming pride and modeſty of their ſex, and to be the firſt officious publiſhers of their own ſhame.

* 21. James 1ſt. Ch. 27. "That women, delivered of baſtard children, *to avoid their ſhame, and to eſcape puniſhment*, do ſecretly bury, and conceal the death of, their children" is the Preamble of this ſtatute: the modern expoſition of which is a good inſtance, that cruel laws have a natural tendency to their own diſſolution in the abhorrence of mankind. It is now the conſtant practice of the courts to require, that the body of the child ſhall be found, before any Conviction can take place; and, if it ſhould happen, that the mother had any child bed linnen, or other preparatives in her poſſeſſion, prior to her delivery, it is generally admitted as a proof, that no concealment was intended. Laſtly, it is not unuſual to require ſome degree of evidence that the Child was actually born alive, before the ungenerous preſumption, that the Mother was the wilful author of the death of her new-born infant, is permitted to affect her. Theſe humane deviations from the harſh Injunction of the ſtatute have nearly amounted to a tacit abrogation of it.

The expreſſions of the Swediſh Law on this ſubject are very ſevere—"Mulier impudica, quæ ex illegitimo concubitu uterum geſtat, nec hoc ante partum aperit, latebras quærens quo furtim enitatur partum, et deinde abſcondit, percutiatur ſecuri, et in pegmate comburatur, *non attento prætextu mortuum vel ante juſtum terminum editum fuiſſe.*

There

Harſh is the conſtruction of treaſons, which ſubjects to that ſentence full of horrors the ſon, huſband, and father, for the protection given to the wife, parent, and child.

The laws of Japan oblige the perſon accuſed to give an anſwer to the accuſation; if his anſwer be falſe, he is puniſhed by death. This is a violation of the firſt principle of ſelf-preſervation.

§. 9. Laws made on the ſpur of the occaſion, ſhould have a ſhort and limited duration; otherwiſe in the courſe of years it will be ſaid "*magis ſæculum ſuum ſapiunt, quam rectam rationem.*"

It is ſtill a Felony to ſteal a hawk, and Death to aſſociate one month with Egyptians [x], or to wander, being a ſoldier or ma-

There is a law to the ſame purport in France; which may alſo be found in the "obſervations on the ancient ſtatutes"—pa. 425. and I find that it is ſtrictly ordered by an ordinance of Henry iii. and by a Declaration of Lewis xiv. to be publiſhed once in every three months in all the pariſh churches.

Code penal. Paris 1755.—8vo. titre 29.

[x] 5. Eliz. ca. 20. p. 23.—and the declaration of Lewis xiv. contre les Bohemiens, et ceux qui leur donnent retraite. Code penal. Pa. 114.

riner,

riner [y], without a teſtimonial under the hand of a Juſtice.

§. 10. Obſolete and uſeleſs ſtatutes ſhould be repealed; for they debilitate the authority of ſuch as ſtill exiſt and are neceſſary. Neglect on this point is well compared by Lord Bacon to the cruelty of Mezentius, who left the living to periſh in the arms of the dead.

Perſons carrying ſubjects out of the northern counties [z], or giving black mail for protection; Gaolers forcing priſoners to become approvers [a]; Maſons confederating to prevent the ſtatutes of labourers [b]; Purveyors in certain caſes [c], though purveyance is aboliſhed; are all capital offenders: and none ſhall bring pollards and crochards (which were foreign coins of baſe metal) into the realm, on pain of forfeiture of life and goods [d]. The alterations in our government have rendered theſe particular proviſions totally ineffective; but there are other obſolete ſtatutes, which exiſt, the poſſible inſtruments of miſchief in the hand of tyranny.

[y] 39. Eliz. ca. 17.
[z] 43. Eliz. ca. 13.
[a] 14. Ed. 3. ca. 10.
[b] 3. Hen. 6. c. 1.
[c] 28. Ed. 1. ſtat. 3. c. 1.
[d] 27. Ed. 1. c. 3.

§. 11. Civil

§. 11. Civil and criminal laws muſt accumulate, and become complicated, in proportion to the increaſed riches of the ſtate; and to the ſecurity given to the liberties, lives, honors, and properties of the people. Deſpotic ſtates admit of a ſimplicity of legiſlation, the forms and principles of which depend on the caprices of a weak and ignorant Monarch, whoſe breaſt is the repoſitory of precedents: but it ſhould be the primary object of free governments, to have the outlines of their privileges fixed and determinate. When the laws for this purpoſe are explicit, it is the duty of the Judge ſtrictly to conform to them; when they are otherwiſe, it is the immediate duty of the Legiſlator to aſcertain them.

It is not therefore ſufficient, that the deciſion of the fact be guarded from the influence of fear and affection; the adjudication of the law ſhould be a certain conſequence of that deciſion. But, when the penalty preſcribed bears an evident and exceſſive diſproportion to the offence, the humanity of the Judges will be intereſted in the evaſion of it, "*et magis valebunt acumina ingenicrum, quam authoritas legis*[a]." And this is a conſideration,

[a] Bac. de augm. ſc.

which, exclusive of every motive of humanity, should induce the lawgiver carefully to discuss the different modes of punishment, as applicable to the different degrees of moral and political guilt.

CHAP. III.

Of the Infliction of Death.

IT is impossible to read the histories of executive justice in different governments without shuddering at the very idea of those miseries, which men, with unrelenting ingenuity, have devised for each other. In some countries it hath been usual to sow up criminals in the warm skins of beasts, and in this condition to expose them to wild dogs; in others the limbs are torn asunder by horses; in others recourse is had to crucifixions, burnings, boilings, flayings, famishings, impalements, and other modes of destruction, equally shocking to decency and humanity.

" Merciful heaven!
" Thou rather with thy sharp and sulphurous bolt
" Split'st the unwedgeable and gnarled oak,

" Than

" Than the ſoft myrtle: O but man, proud man,
" (Dreſt in a little brief authority,
" Moſt ignorant of what he's moſt aſſur'd,
" His glaſſy eſſence) like an angry ape,
" Plays ſuch fantaſtic tricks before high heaven
" As make the angels weep [f].

This imputation of tyranny and cruelty hath at different periods been applicable to every government, of which we have any authentic hiſtory. Livy, in reſpect to his Countrymen, hath endeavoured to eſtabliſh a different inference in his account of the puniſhment of M. Suffetius [g]; " *Exinde, duabus*
" *admotis quadrigis, in currus earum diſtentus*
" *illigatur Metius; deinde in diverſum iter*
" *equi concitati, lacerum in utroque curru*
" *corpus, quâ inhæſerant vinculis membra,*
" *portantes. Avertêre omnes a tantâ foedi-*
" *tate ſpectaculi oculos. Primum, ultimum-*
" *que illud ſupplicium apud Romanos exempli*
" *parum memoris legum humanarum fuit;*
" *in aliis gloriari licet, nulli gentium mitiores*
" *placuiſſe poenas:*" We know that national Benevolence ought to be the concomitant of national Liberty, and are therefore inclinable

[f] Shakeſpeare Meaſ. for Meaſ. [g] L. 1. c. 28.

to give credit to this aſſertion; but it will not be found in any degree reconcileable to the united teſtimony of many other Hiſtorians. The modes of capital puniſhment, uſed by the Romans, were at leaſt as numerous, and as exceptionable, as thoſe of other Nations. The head of the malefactor was in ſome caſes faſtened within the furca, and in this attitude he was whipped to death [h]; and this was diſtinguiſhed by the name of [i] *ſupplicium more majorum.* In other caſes, as in the execution of Antigonus, the whipping terminated in beheading [k]. Crucifixion, or the *ſervile ſupplicium* was in uſe during many centuries, and firſt abrogated by Conſtanſtine; the ſentence alſo inflicted whipping, "*verbera intra aut extra pomoerium, arbore infelici ſuſpendito*[l]." The criminal was naked in the execution of theſe different puniſhments. Parricides [m] were ſewed up in a leather ſack with an ape, a

[h] *Æs. Nam ſi moleſtus pergis eſſe, jam intro abripiere, atque ibi uſque ad necem operiere loris. San. loris liber? Æe. ſic erit.* Jer. Adelph. 2. 1.

[i] *Sueton. in vitâ Neron.* ca. 49.

[k] Dion L. 49.

[l] Liv. l. 1.—and Val. max. l. 1. c. 7.

[m] *Cujus ſupplicio non debuit una parari*
Simia, nec ſerpens unus, nec culeus unus. Juv. l. 8.
See alſo, Dig. 48 ad leg. Pomp.—& Cic orat pro Sext. Roſcio.

cock,

cock, a ſerpent, and a dog, and ſo caſt into the ſea. It was alſo uſual to cover ſome offenders with a mantle dawbed over with pitch, and then to ſet fire to it; *Cogita, inquit Seneca* [n], *illam tunicam alimentis igneis illatam et intextam.* The Emperors introduced a puniſhment called " *Seme-diſſectio* [o]. *Damnatio in gladium*, or ſentence to the public combats, and *damnatio ad beſtias*, were alſo frequent; and the latter appears to have been very fatal; " *præclara ædilitas!* ſaid Cicero, *unus Leo, ducenti Beſtiarii*".

Theſe cruelties were founded on the twelve tables of the Decemvirs, and were contrary to the republican ſpirit. Accordingly by the Porcian law, made in the 454th year of Rome, it was ordained, that no Citizen ſhould be put to death. This exemption was in the other extreme, and erroneous in its foundation. Capital executions are in all ſtates neceſſary.

§. 2. Nothing however, but the evident reſult of abſolute neceſſity, can authorize the deſtruction of mankind by the hand of man.

[n] Ep. 14. [o] Sueton in vitâ Calig—ca. 27.

The infliction of Death is not therefore to be considered in any instance, as a mode of punishment, but merely as our last melancholly resource in the extermination of those from society, whose continuance among their fellow-citizens is become inconsistent with the public safety.

§. 3. We may pronounce it then contrary both to sentiment and morality, to aggravate capital executions by any circumstances of terror or pain beyond the sufferings inseparable from a violent death.

The punishment of the murderer after tryal and conviction was by the Athenians left to the relations of the deceased, who might put him to death if they thought proper; but it was not permitted them to use any degree of torture, or to extort money[p]; Excellent restrictions! which taught the prosecutor to

[p] Demosthenes hath given a full explanation of this law, which ordered the murderer, if put to death, to be executed in the district, or parish of the deceased; εν τη τῳ πεπονθοτος πατριδι: "*sequitur in lege* λυμαινεσθαι δε μη. *quibus* "*verbis significatur, non licere flagris cædere homicidam, vincire,* "*laniare, lacerare ora, manus, populari tempora raptis auribus, &c.* Pet. leg. Att. pa. 611.

Demosth. orat, adv. Aristoc. pa. 410.

seek

ſeek juſtice not revenge; in wrath to remember mercy; and to feel leſs, what he in his own intereſts had ſuffered, than what the Offender was about to ſuffer.

It was a cuſtom among the Jews to give wine mingled with myrrh to the malefactor at the time of his execution; in order, as it is ſaid, to cauſe a ſtupor, and deaden the ſenſibility of the pain.

I tranſcribe the following anecdote from the Engliſh State-tryals. "Hugh Peters being carried on a ſledge to the ſcaffold, was made to ſit therein within the rails, to behold the execution of Mr. Cook. When Mr. Cook was cut down, and brought to be quartered, Col. Turner ordered the Sheriffs men to bring Mr. Peters near, *that he might ſee it*; and bye and bye the hangman came to him all beſmeared in blood, and, rubbing his bloody hands together, he tauntingly aſked, "Come how do you like this work, Mr. Peters, how do you like it". He replied, "Friend you do not well to trample on a dying Man".

Shall we plant thorns in the path of Miſery? God forbid! Such refinements of inhumanity are admiſſible only in governments ſo abo-

minable to their Conſtitution, as to make the mere loſs of life deſirable.

§. 4. Solemnity indeed is requiſite for the ſake of example; but let not death be drawn into "lingering ſufferance;" detain not the excruciated ſoul upon the verge of eternity. A degree of mercy on this point was ſhewn even by the brutal Caligula, when he ſaid to an excutioner, "*Ita feri, ne mori ſe ſentiat.*"

§. 5. Lawgivers ſhould remember, that they are, mediately, and in effect, the executioners of every criminal, who ſuffers death in conſequence of any penal ſtatute; and there are certain ſtriking points of view, in which it may be of uſe to them to conſider criminals at the approach of death.

"[s] Maſter Barnardine, what hoa! your "friend the hangman! you muſt be ſo good, "Sir, to riſe, and be put to death: Pray, "Maſter Barnardine, awake, till you are ex-"ecuted, and ſleep afterwards."

The wretch, to whom this laſt ſummons is ſo ludicrouſly addreſſed, is repreſented to us,

[s] Shakeſpeare Meaſ. for Meaſ. Act. 4. Sc. 3.

"as

"as a man, that apprehends death no more dreadfully, but as a drunken dream; careleſs, reckleſs, and fearleſs of what's paſt, preſent, or to come."

The crimes of ſuch a man may perhaps have made him unfit to live, but he is certainly unfit to die. The ſafety of the community, and the preſervation of individuals, may call for his execution; but the boſom of humanity will heave in agony at the idea; the eye of religion will turn with horror from the ſpectacle.

Suppoſe the ſufferer on the contrary to have been a valuable member of ſociety, and to have erred only from ſome momentary impulſe of our imperfect nature; one, who in the recollection of reaſon hath found repentance; who reſigns with chearfulneſs that life, which hath become a forfeiture to the law, and looks up in confidence to heaven for that forgiveneſs, which is not to be found on earth. The laſt footſteps of ſuch a man, are watered with the tears of his fellow-citizens; and we hear from the mouth of every ſpectator,

"Yes, I do think, that you might pardon him,
"And neither heaven, nor man grieve at the mercy."

CHAP.

CHAP. IV.

Of Baniſhment.

§. 1. THE Romans permitted an accuſed *Citizen*, in every caſe *before* judgment, to withdraw himſelf from the conſequences of conviction into voluntary exile.

" *Exilium* (inquit Cicero) [r] *non ſupplicium* " *eſt, ſed perfugium, portuſque ſupplicii. Ita-* " *que nullâ in lege noſtrâ reperietur, ut apud* " *cæteras civitates, maleficium ullum exilio* " *eſſe multatum. Sed cum homines vincula,* " *neces, ignominiaſque vitant, quæ ſunt legibus* " *conſtitutæ, confugiunt, quaſi ad aram, in ex-* " *ilium; qui, ſi in civitate legis vim ſubire vel-* " *lent, non prius civitatem, quam vitam amit-* " *terent.*"

§. 2. Tranſportation was totally unknown to the common law of England; but the antient practice of abjuration of the realm bore a ſtrong reſemblance to it. " This was per-

[r] Orat. pro A. Cæcin.

" mitted

" mitted, ſays Sir E. Coke, when the felon " choſe rather, *perdere patriam, quam vitam.*" The oath of perpetual baniſhment was then adminiſtered to him by the Coroner in the church, or church-yard, to which he had fled; and a croſs was delivered into his hand for his protection on his journey. This cuſtom no longer ſubſiſts; for the privileges of ſanctuary[s] being taken away by the act of Ja. I. the abjuration, as at the common law, being founded thereon, was virtually aboliſhed.

At preſent, baniſhment is in England, as in Ruſſia[t], more frequently inflicted as a mode of puniſhment, than permitted as an act of mercy. But in Ruſſia it is made ſubſervient to political utility; and thoſe, who have by their miſconduct loſt all claim to the indulgence of their countrymen, are compelled to undergo a ſeparation from all domeſtic connections, the

[s] A very particular deſcription of ſanctuary and abjuration may be found in "Le Grand Couſtumier." fol. 13. §. 81. See alſo the Mirror, c. 1. §. 13.

[t] L'exil en Siberie porte avec ſoi une ſorte de reprobation; il rend un homme ſi malheureux, que quoiqu'il vive au milieu de ſes ſemblables, tout le monde le fuit; perſonne n'oſe avoir avec lui aucune eſpece de liaiſon; mais c'eſt moins a cauſe du crime qu'on lui ſuppoſe, que par la crainte qu'on a du deſpôte.

Voyages en Sib. J. 1. pa. 236.

gours

rigours of a horrid climate, and the unhealthineſs of mines, in the place of better citizens, who muſt otherwiſe be neceſſitated to accept ſo ſevere a lot.

On the contrary, every effect of baniſhment, as practiſed in England, is often beneficial to the criminal; and always injurious to the community. The kingdom is deprived of a ſubject, and renounces all the emoluments of his future exiſtence. He is merely transferred to a new country; diſtant indeed, but as fertile, as happy, as civilized, and in general as healthy, as that which he hath offended.

It would not be incredible then, if this puniſhment ſhould be aſſerted in ſome inſtances to have operated even as a temptation to the offence; in many inſtances hath its inſufficiency been a fatal argument for the multiplication of capital penalties.

§. 3. It deſerves ſerious and immediate conſideration, how far, and by what means this defect in our law may be redreſſed. It might perhaps be practicable to direct the ſtrict employment of a limited number of convicted felons in each of the dock-yards, in the ſtannaries,

naries, ſaltworks, mines, and public buildings of the kingdom. The more enormous offenders might be ſent to Tunis, Algiers, and other Mahometan ports, for the redemption of Chriſtian ſlaves; others might be compelled to dangerous expeditions; or be ſent to eſtabliſh new colonies, factories, and ſettlements on the coaſts of Africa, and on ſmall iſlands for the benefit of navigation. It muſt however be confeſſed, that it is not eaſy to determine upon theory the ſucceſs of political innovations; it is indeed impoſſible for a ſpeculative writer in his cloſet to collect the proper materials for this purpoſe. Practicable ſchemes on ſuch ſubjects can only be obtained from merchants and others, who are qualified by experience to point them out, and have the inducement of intereſt to promote their ſucceſs.

§. 5. I cannot diſmiſs this ſubject without expreſſing a doubt, relative to the propriety of puniſhing by death a return from tranſportation; eſpecially where the original offence was not capital. It certainly is not juſtified by neceſſity; for it is eaſy, if requiſite, to ſend the delinquent abroad again, without any conſiderable degree either of expence or trouble.

ble. Will it be ſaid, that he deſervedly ſuffers for the breach of a compact, which he is ſuppoſed to have made? In many inſtances the tranſportation is not in the nature of a conditional pardon, but directed by poſitive law;[n]

[n] In ſupport of this aſſertion I ſhall cite ſome authorities; *previouſly obſerving*, that "excluſion from ſociety is the proper puniſhment of thoſe only, who are become objects of terror to their fellow-citizens, in conſequence of very heinous crimes, either not equivalent to the *ultimum ſupplicium*, or of which they have been convicted by diſputable and unſatisfactory evidence.

By 6 Geo. 1. c. 23. and 4 Geo. 1. c. 11. any perſons convicted of larceny either grand or petit, and entitled to clergy, may in the diſcretion of the court be directed to be tranſported to America for ſeven years; and if they return within that time it ſhall be felony without benefit of clergy.

By ſtat. 10. Geo. 2. c. 32. The penalty of tranſportation for ſeven years is inflicted on the ſecond offence of ſtealing deer in any unincloſed foreſt; and for the firſt offence upon ſuch as come to hunt there, armed with offenſive weapons.

By 26 Geo. 2. c. 19. §. 11. Perſons convicted of aſſaulting any magiſtrate or officer, &c. in the ſalvage of any veſſel or goods, are to be tranſported for ſeven years.

Ibid, c. 33. §. 8. Perſons convicted of ſolemnizing matrimony without banns or licence, &c. ſhall be tranſported for fourteen years.

Alſo, by 5 Geo. 3. c. 14. Perſons ſtealing, or taking fiſh in any water within a park, paddock, orchard or yard, and the receivers, aiders, and abettors ſhall be tranſported for ſeven years.

I have not ſelected theſe as the *moſt* exceptionable inſtances; there are many others, in which tranſportation is inflicted upon offences by no means ſo heinous in their nature, as to require the extirpation of the criminal from the ſociety of his fellow-citizens.

in

in no inſtance is ſuch a compact reconcileable to the law of nature.

On the whole, is not ſuch ſeverity inconſiſtent with that leading principle, which forbids penal laws to attack the natural ſentiments of the heart? "*Duri eſt non deſiderare* "*patriam. Cari ſunt parentes, cari liberi,* "*propinqui, familiares; ſed omnes omnium ca-* "*ritates patria una complexa eſt: pro quâ quis* "*bonus dubitet mortem oppetere?*

§. 6. By ſtat. 20 Geo. 2. c. 46. It is made a felony, without benefit of clergy, for rebels under ſentence of tranſportation to go into France or Spain; and the ſame ſeverity is extended to all the friends of ſuch perſons, keeping or entertaining any correſpondence with them by letters, meſſages, or otherwiſe."

In the wording of this clauſe, there is not any ſaving of even the moſt innocent interchanges of friendſhip. Shall then the lawgiver infringe all the ties and privileges of humanity? Shall he point the ſword of juſtice againſt the boſom of fidelity? To ſuch a lawgiver I would ſay, "Conſult your own "heart, and inflict not chaſtiſement on ac-

"tions,

" tions, which a good mind cannot diſap-
" prove."

CHAP. V.

Of Forfeiture and Corruption of Blood.

NEC vero me fugit, quam ſit acerbum parentum ſcelera filiorum pœnis lui: ſed hoc præclare legibus comparatum eſt, ut caritas liberorum amiciores parentes reipublicæ redderet.[w]

On a ſuperficial glance, it ſeems harſh, in a moral view, to extend the diſgrace and infamy of the guilty anceſtor to the innocent deſcendant; and to involve a whole family in the puniſhment of one criminal. In a political light it ſeems contrary to the principles of freedom, to inſtitute irregular fluctuations of property, and to leave ſo baneful a tool to the miſapplication of poſſible tyranny, or the rage of civil troubles. A very ingenious anſwer hath been given to theſe objections by a late learned perſon; from whoſe excellent ar-

[w] Ciceron. ad Brutum Ep. 12.

gument

gument (without adopting all the concluſions, for which he ſo ably contended) we muſt at leaſt collect, that the law of forfeitures, when properly directed and reſtrained, is a ſalutary terror in defence of the ſtate, neither cruel nor impolitic.

Was it ever alledged againſt the puniſhment of death, that "its conſequences cannot in "any caſe be confined to the criminal; but "muſt of neceſſity go beyond him, to ſome "connected with him by friendſhip, intereſt, "or nature?" [x]—Society is ſupported by this neceſſity, whilſt individuals ſuffer by it. *Omne magnum exemplum habet aliquid ex iniquo, qnod contra ſingulos utilitate publicâ rependitur.*[y]

But it will be ſaid, that the collateral conſequences of forfeiture are not the creatures of neceſſity, but of poſitive inſtitution. Be they ſo; it is neither unjuſt nor unwiſe to convert human partialities to the promotion of human happineſs. Deſcendible honors, and the expectations of inheritance, are the gifts of ſociety; conditional gifts, and therefore revo-

[x] Conſid. on the law of forfeiture. p. 10.
[y] Tacit. annal. L. 14.

cable, and may be modified by the public diſcretion for the public benefit.

§. Theſe arguments are offered in defence only of forfeitures immediately affecting the criminal; and it may ſeem a ſufficient ſeverity, that the children are thereby reduced to preſent poverty.—It is not ſo eaſy to reconcile either to reaſon or benevolence, that corruption of blood, a further conſequence of Engliſh attainders, by which the inheritable quality is for ever extinguiſhed.

The grandfather poſſeſſes an eſtate in fee; his ſon commits treaſon, and is executed; this attainder is a never-ceaſing bar to the claim of the grandchild, and his poſterity. A father, ſeized of an eſtate in fee, dies, leaving two ſons, the elder of whom is attainted; the younger cannot ſucceed, though the immediate deſcendant of innocent anceſtors; nor can the children of the elder. Why, it will be ſaid, ſhould the impediment of blood ſtop the courſe of deſcent as to eſtates, over which the criminal, as he never had any poſſeſſion, could have no influence? It is an obvious anſwer, that the law requires the claimant by deſcent to prove himſelf heir to the perſon

perſon laſt ſeized; and in theſe caſes a link of the deſcending chain is irrecoverably loſt.

We muſt not however argue from ſpecial caſes againſt general ſyſtems. Perfection unexceptionable cannot be the reſult of human diſpenſations; and it would turn this beautiful fabric of our liberties to a fantaſtical, confuſed ſcene of prepoſterous diſtinctions, if it were allowable to ſet up perſonal compaſſion, and private hardſhips, in oppoſition to the conſiſtency of legal principles.

Yet there are caſes, in which it is difficult for the artificial inferences of reaſon to give ſatisfaction to the natural dictates of ſentiment.—A criminal is attainted, in the year 1770, for an offence, then only diſcovered, but committed in the year 1760.—Suppoſe him, in this interval, to have alienated one half of his eſtate to a fair purchaſer, and to have contracted *bonâ fide* debts, equivalent to the other half. The *Alienée* muſt be diſpoſſeſſed, and the honeſt creditors are left without remedy; for "the forfeiture of lands (ſays the "law) has a relation to the time of commit-"ting the offence, ſo as to avoid the inter-"mediate charges and conveyances."

Again, if the Huſband and Wife be poſſeſſed jointly of a term of years in land, and the huſband drown himſelf, the land ſhall be forfeited to the King; and the wife muſt loſe the benefit of the Survivorſhip. For, by the act of caſting himſelf into the water, which is the cauſe of the felony committed, he forfeits the term; and this gives a title to the King, in preferenee to the wife's title by ſurvivorſhip, which could not accrue till the inſtant of her huſband's death.*

Many of the inferior felonies ſubject the the offender to the forfeiture of goods and chattels; whence reſults a very unequal diſtribution of juſtice. A rich trader, and an affluent country-gentleman, being involved preciſely in the ſame ſpecies and degree of guilt, the children of the former are reduced to beggary, while the family of the latter retain all their opulence. The death of the anceſtor, before conviction and judgment, diſcharges, as to the real eſtate, all proceedings and forfeitures. So that the law furniſhes a

* Black. Comment. 4. 190.---Plowden 260.---This was determined in the caſe of Lady Margaret Hales, wife of Sir James Hales (one of the Judges of the Common Pleas, who drowned himſelf in the third year of Q. Eliz.

temptation

temptation to the Criminal to ruſh uncall'd for into the preſence of the Almighty, with all his imperfections on his head, by adding Suicide to the catalogue of his offences.

Valerius Maximus gives us an example of the effect of a temptation of the ſame kind in his account of Licinius Macer. He tells us, that, at the concluſion of his tryal, perceiving Cicero ready to give judgment againſt him, he ſtopped his breath with a handkerchief, and expired; that by this means the eſtate was ſaved to his Son Licinius Calvus, afterwards an Orator of great eminence[a]. In the latter ages of the Roman law, a diſtinction was made, inflicting forfeiture on thoſe, who killed themſelves under the accuſation of a capital crime.

§. 3. Bills of attainder are exertions of thoſe extraordinary powers, which ought to be uſed only on the preſſures of real and urgent neceſſity; but never to be deſecrated to the gratification of political reſentments.

One of Henry the eighth's parliaments attainted the Counteſs of Saliſbury, the Mar-

[a] Val. Max. 9. 12.

chioneſs of Exeter, and two Gentlemen, without better proofs, than the unſupported ſuggeſtions of that wretched ſycophant Cromwell, and without any tryal or even citation to appear before them. This inſtrument of regal tyranny fell a ſacrifice to the ſame iniquitous meaſures himſelf. He was in the year following declared Vicar general of the kingdom; and, a few weeks afterwards, under an Attainder of the ſame parliament, without tryal, examination or evidence, condemned to death, and executed [b].

It is impoſſible to apologize for the many bloody ſtains, which we find indelibly affixed upon Engliſh hiſtory, by this paſſionate, and irregular mode of puniſhing. Even Strafford, whom, as an Engliſh ſtateſman, we muſt, as Engliſhmen, abhor, muſt in candour be confeſſed to have fallen a victim to the indiſcreet rage of an Engliſh parliament. "We have "lived, my lords, (ſaid he at the concluſion "of his eloquent defence) happily to ourſelves "at home; we have lived glorioufly abroad "to the world; let us be content with what "our fathers have left us; let not our am-

[b] Burnet vol. 1. pa. 278.

"bition

" bition carry us to be more learned, than " they were, in killing, and deſtructive arts. " Were it not for the intereſt of theſe " pledges, which a Saint in heaven left me, " I ſhould be loth—(here he pointed to his " children, his voice faultered, and his weep- " ing ſtopped him) " what I forfeit for my- " ſelf, it is nothing: but I confeſs, that my " indiſcretion ſhould forfeit for them, wounds " me very deeply. You will pardon my in- " firmity; ſomething more I ſhould have " ſaid, but I ſee I ſhall not be able, and " therefore I ſhall leave it".

" Such (ſays the philoſophical Hiſtorian) were the capacity, genius, and preſence of mind, diſplayed by this magnanimous ſtateſ- man, that, whilſt argument, and reaſon, and law had any place, he obtained an undiſputed vic- tory: and he periſhed at laſt overwhelmed, and ſtill unſubdued, by the undiſguiſed vio- lence of his fierce and unrelenting antagoniſts". Weak is the effect of eloquence on the pre- determinations of party! The Parliament proceeded in the Attainder; but in a few weeks remitted to the children the more ſevere con- ſequences of the ſentence.

That, " *whoever deſerves to die, and dies by an act of the whole Legiſlature, dies juſtly*", is a poſition, which in the conſtruction of unprejudiced reaſon is certainly true: but it ſhould be remembered, that many requiſites muſt concur to ſhew, that the party proſecuted *deſerves to die*; requiſites, which, in moſt caſes of Attainders, have been too precipitately aſſumed. But I return to my ſubject.

§. 4. Upon the whole, tho' it be not unequitable, " that thoſe contingent advantages, which the civil qualifications of the blood have brought into view by the deſert of one Anceſtor, ſhould be intercepted by the crimes of another [c]:" yet it is with pleaſure, I ſee the approach of that day, when the poſthumous rigours of forfeitures will be removed, and the impediments of deſcent no longer affect a blameleſs poſterity.

The Stat. 7. Ann. ca. 21. provides, that, after the deceaſe of the then Pretender, no attainder for treaſon ſhall extend to the diſinheriting of any heir, nor to the prejudice

[c] Conſiderations on the Law of Forfeiture.

of

of the right, or title of any perſon, or perſons, other than the right or title of the offender, or offenders, during his, her, or their natural lives only; giving alſo a power of entry after their deaths, as if ſuch attainder had never happened.

It was thought expedient, in the year 1744, to ſuſpend the operation and effect of this ſtatute, till after the deceaſe of the preſent Pretender and his brother.

This ſuſpending clauſe was debated with great warmth, and profuſion of learning, between Sir Dudley Ryder, and Mr. Fazakerly; by the latter of whom it was contended, to be virtually ſubverſive of the conditions of the Union; inconſiſtent with the ſpirit of our Conſtitution, with the dictates of humanity, and the principles of policy. It was alſo the ſubject of much eloquence in the upper houſe.

In fact, when the Act of Union paſſed in the fifth year of the Queen, this point had been left undetermined; but upon a tacit undertaking, well underſtood on the part of the Scots, (who had no intention to make themſelves liable to Engliſh attainders) that it ſhould

ſhould be afterwards adjuſted. The ſubſequent Act was accordingly framed "for improving the union of the two kingdoms".[d] But, as a total immunity from the forfeiture of real eſtates was not founded on any requiſition of Scotland, either expreſſed or implied; it is difficult to conceive the reaſon, which induced the parliament to carry the remedy ſo far beyond the grievance then in contemplation.

The mere execution of the criminal is a fleeting example, but the forfeiture of lands leaves a permanent impreſſion: It is indeed one of our beſt conſtitutional ſafe-guards, when applied with diſcretion to the preſervation of moral conduct, and uſed without violence to the correction of guilt. *This branch of the penal ſyſtem will not therefore be ſuffered to fall from the body of our law without ſerious conſideration:* but we may

[d] Stat. 7. Ann. ca. 21.—the Preamble is in the following words. "Whereas nothing can more conduce to the improving the union of the two kingdoms, than that the Laws of both parts of Great Britain, ſhould agree as near as may be, eſpecially thoſe Laws which relate to High Treaſon and the proceedings thereon as to the nature of the crime, the method of proſecution and trial, and alſo the *forfeitures and puniſhment* of that offence; which are of the greateſt concern both to the King and the Subject."

ſafely

ſafely conclude, that the corruption of blood, with all it's endleſs conſequences, will have a ſpeedy and total abolition; as any further intervention of Parliament therein would be contrary to that ſacred regard, which is due to national compacts.

§. 4. But it ſhould be obſerved, that this Proviſion extends to Attainders, only in caſes of high Treaſon: they will ſtill operate in full force upon the crimes of petty treaſon, and on many, if not all the higher felonies.

If ſuch an inconſiſtence be ſuffered, it will make the Engliſh law the very reverſe of the ſyſtem of Arcadius; who, leaving treaſons liable to the utmoſt ſeverities, ſpeaks of other offences in the following words; "*Sancimus* "*ibi eſſe poenam, ubi et noxia eſt; propinquos,* "*notos, familiares, procul a calumnia ſubmo-*"*vemus, quos reos ſcelerio ſocietas non facit.* "*Nec enim affinitas, vel amicitia, nefarium* "*crimen admittunt; peccata igitur ſuos teneant* "*auctores; nec ulterius progrediatur metus,* "*quam reperiatur delictum.*"

CHAP.

CHAP. VI.

Of Impriſonment.

§. 1. IMpriſonment, inflicted by law as a puniſhment, is not according to the principles of wiſe legiſlation. It ſinks uſeful ſubjects into burdens on the community, and has always a bad effect on their morals: nor can it communicate the benefit of example, being in its nature ſecluded from the eye of the people.

Theſe objections are obviouſly true; but their influence on the Laws of England hath not been uniform. It is not unuſual, by the poſitive inſtitutions of this land of liberty, to puniſh offenders by confinement; in many caſes, temporary; in others, as in the inſtance of ſtriking at any perſon in the King's courts of juſtice, of reſcuing a priſoner, and in every caſe of Præmunire, perpetual. And in this light, as a mode of puniſhment, it was conſidered in the earlier ages of our Law; of which I find the following inſtance in the ſtatute

ſtatute of Weſtm. the 2d.[a] A. D. 1285. "*Qui monialem a domo ſuâ abducat, licet monialis conſentiat, puniatur per priſonam trium annorum, et ſatisfaciat domui, a quâ abducta fuerit, competenter.*"

§. 2. It is the proper end of cuſtody, to keep thoſe, who are accuſed of injuries to ſociety, amenable to the deciſions of juſtice. But, as accuſations are not proofs, and as innocence is to be preſumed in every ſtage of the charge, previous to the conviction of guilt; the utmoſt tenderneſs and lenity are due to the perſon of the priſoner. And here it ſhould be particularly obſerved, that *it is contrary both to public juſtice and public utility, to throw the accuſed and convicted, the innocent and the guilty, indiſcriminately, into the ſame Dungeon.* From a numberleſs variety of accidental circumſtances, which happen in the courſe of human tranſactions, It muſt fall to the lot of many, to become Inſolvent. Debtors therefore, tho' certainly a ſpecies of Criminals, ſhould in general be conſidered rather as unfortunate, than culpable. Humane treatment they have a claim to; nor

[a] 13 Ed. 1ſt. ca. 34.

can

can We, conſiſtently with any good principle, either of morals or government, refuſe the ſame to perſons accuſed, or even to the moſt atrocious convicts. It will follow, that a ſpecial care ſhould be taken, leſt the neceſſary miſeries of a gaol be aggravated by the unreſtrained cruelty of the gaoler.

§. 2. I might refer to the very excellent proviſion of the civil law on this ſubject;[h] but ſuch peculiar attention hath been ſhewn to it both by the common, and ſtatute law of England, that nothing more can be deſired; except that improvement in the airineſs and extent of the buildings, which the induſtrious refinement of a ſenſible age is ſoon likely to produce.

The appointment of gaolers reſts with the ſheriff, who is in ſome degree reſponſible for their good behaviour,[k] and intereſted therefore in the choice of proper perſons; from whom he is alſo required to exact very ample ſecurity. The body of a man dying in priſon is not to be interred, until the Coroner's inqueſt

[h] Domat's civil law. v. 2. p. 287.
[k] Dalt. c. 118. 4 Rep. 34.

hath

hath examined it: and, in point of law, if a priſoner dies in dureſs of the goaler by hard confinement, and ſeverities unneceſſary to the ſafe cuſtody, it is murder.[l] Theſe preventives of ſecret tyranny have been well preſerved to the ſubject by frequent proſecutions, the effects of uſeful and compaſſionate enquiries, occaſionally inſtituted by the two houſes of Parliament. And laſtly, the abuſes, extortions, and inſults of gaolers towards the unfortunate perſons in their cuſtody, are more particularly guarded againſt by a late very comprehenſive ſtatute;[m] the proviſions of which are very beneficial both to debtors and criminals, though more eſpecially intended for the former.

§. 3. This extraordinary anxiety of our law in favour of priſoners is by no means ſuperfluous; for it muſt be confeſſed that gaolers are in general a mercileſs race of men.

[l] Strange 856 & 884. The caſes of Caſtel v. Bambridge and Corbet; and of the King v. Huggins. Mr. Juſtice Forſter, p. 322. hath inadvertently ſtated the opinions collaterally given by the court in theſe caſes, as the poſitive deciſions of the court againſt the defendants: whereas, in the firſt caſe, there being no pretence to charge either of the appelleés, the jury brought them in, Not guilty: and in the other caſe, "it is the judgment of the court on the ſpe-"cial verdict, that the priſoner Huggins is Not guilty, "and therefore he muſt be diſcharged."

[m] 32 Geo. 2. c. 28.

The

The Count de Lauzun paſſed the long interval from the year 1672 to 1681 in the priſon of Pignerol. It has been well obſerved,[a] "that, with pen, and ink, and paper, albeit "a man cannot get out of priſon, he may do "very well within, and at laſt come out a "wiſer man than he entered;" but theſe conſolations did not fall to the lot of the Count de Lauzun.—At a diſtance from the voice of friend or relation; without any ſounds except his own ſighs; without any light except the glimmering through the ruins of the roof; without books, means of occupation, or poſſibility of exerciſe; a prey to hope deferred, corroding languor, and uninterrupted horror; he at laſt, as the only means of avoiding inſanity, had recourſe to the expedient of taming a ſpider.—"Miſery, ſays Trinculo, makes a "man acquainted with ſtrange companions." The ſpider received his flies every morning with gratitude, carried on his webs through the day with alacrity, and engaged the whole attention of his benefactor; until the gaoler, converſant in ſcenes of wretchedneſs, and conſequently ſteeled againſt every tender ſenſation, accidentally diſcovered this amuſement

[a] Sterne.

of

of his priſoner, and in the wantonneſs of tyranny officiouſly deſtroyed the ſubject of it. M. de Lauzun afterwards declared, that he conceived his agony on this occaſion to have been more painful than that of a fond mother on the loſs of a darling child.

CHAP. VII.

Of Corporal Puniſhments, and of Infamy.

§. 1. WE are told, that in Sparta it was thought a very diſgraceful ſentence to the criminal, to loſe the privilege of lending his wife to another man, or to be confined to the ſociety of virgins.

The authenticity of the fact is immaterial, if the inference be admitted, which is, that, *in a moderate and virtuous government, the idea of ſhame will follow the finger of the law*; and that, whatever ſpecies of puniſhment is pointed out as infamous, will have the effect of infamy. *Exiſtimatio eſt dignitatis illæſæ ſtatus, legibus ac moribus comprobatus, qui ex delicto noſtro, auctoritate legum aut minuitur, aut conſumitur.*

ſumitur.[o] The puniſhment of ſtrangling is deemed honorable by the Ottoman family, who think it infamous, that their blood ſhould be ſpilt upon the ground; in England it is thought a more reſpectable death to be beheaded.

§. 2. Let legiſlators then remember, that the ſtamp of ignominy is intruſted to their diſpoſal; and let them uſe with œconomy, and diſcretion, this beſt inſtrument for the promotion of morality, and the extirpation of vice.

Shame loſes its effect, when it is inflicted without juſt and cautious diſtinction; or when, by the wantonneſs of oppreſſion, it is made familiar to the eye. The ſenſibility of the people, under ſo extravagant an exertion of power, degenerates into deſpondency, baſeneſs, and ſtupidity: their virtue is of forced extraction, the child of fear, with all the meanneſs of the parent entailed upon it. The tranquility of ſuch a ſtate, ſays Monteſquieu, is the mournful ſilence of a city, which the enemy is about to ſtorm.

[o] Dig. L. 1. T. 13. 5. §. 1.

The

The preſent Empreſs of Ruſſia is aware, that immoderate efforts are the ſymptoms of inſufficiency, and have always more fury than force; that the ſecurity of the prince decreaſes in proportion to the exorbitance of his deſpotiſm; and that the national ſenſibility is the beſt ſpring of national power. But a few years ago, prior to the reign of the late Empreſs Elizabeth, it was no more diſgrace to a Ruſſian nobleman to receive a public flogging from the arm of the hangman, than it is at this moment to a miſerable Japoneſe to pay with his ſkin the coſts of a civil action, thought nugatory by the judge. The Muſcovites no longer wed their wives with a whip inſtead of a wedding ring; and Ruſſia riſes into the reſpect of Europe. The Japoneſe ſtill ſubmit to the daily diſcipline of the laſh; and Japan continues the contempt of the world.—The cudgel (ſays du Halde) is the Governor of China; the Chineſe (ſays the writer of Lord Anſon's voyage) are eminent for timidity, hypocriſy, and diſhoneſty.

§. 3. Corporal puniſhments, immediately affecting the body, and publickly inflicted, ought to be infamous in the eſtimation of the people; ſo ſhould degradations from titles of

honor, civil incapacities, brandings, and public exhibitions of the offender: all which penalties ſhould be applied with great caution, and only to offences infamous in their nature.

§. 4. In any caſe, to affix a laſting, viſible ſtigma upon the offender, is contrary both to humanity and ſound policy. The wretch finding himſelf ſubjected to continual inſult, becomes habituated to his diſgrace, and loſes all ſenſe of ſhame. It is impoſſible for him to form any irreproachable connection; for virtue, though of a ſocial nature, will not aſſociate with infamy. Yet this practice of branding hath prevailed in every known ſyſtem of laws; as with us at preſent, in the puniſhment of many offences; and in all caſes, when the offender, not being a clergyman, is admitted to the benefit of clergy. In like manner by the laws of France " *Ceux & celles, qui après* " *avoir été condamnés pour vol, ou flètris de quel-* " *què autre crime, que ce ſoit, ſeront convaincus* " *de rècidive en crime de vol, ne pourront être* " *condamnès à moindre peine que, ſcavoir, les* " *hommes aux galeres à tems, ou à perpètuité,* " *et les femmes a ètre de nouveau fletries d'un* " W. *ſi cèſt pour récidive de vol, ou d'un ſim-* " *ple* V. *ſi la premiere flétriſſure a été encouroue*

" *pour*

« *pour autre crime.*[p] *Et ceux qui ſeront con-*
« *condamnés aux galeres à tems on a perpetuite*
« pour quelque crime que ce puiſſe être, *ſe-*
« *ront flétries, avant d'y être conduits, des trois*
« *lettres* G. A. L. *pour, en cas de rècidive en*
« *crime qui mèrite peine afflictive, ètre punis de*
« *mort.*[q]" So alſo among the Romans, it was uſual, but only when the crime was infamous in its nature, to affix ſome branding, or ignominious letter on the forehead of the criminals; and perſons ſo branded were afterwards called *inſcripti*, or *ſtigmatici*, or by a more equivocal term, *literati*;[r] an expreſſion adopted in ſtat. 4 Hen. 7. c. 13. which recites that diverſe perſons *lettered* had been more bold to commit miſchievous deeds, *&c.*

§. 5. I ſay nothing of baſtinadoes, mutilations, and a variety of other modes of puniſhing, equally inconſiſtent with decency and humanity: ſuch refinements of cruelty put the whole ſpecies, rather than the criminal, to diſgrace.

[p] Code penal 8vo. A. D. 1755, p. 105. Declaration du Louis 15.

[q] 138.

[r] Coel. Rhod. l. 7. c. 13.

Artaxerxes moderated the ſeverity of the laws of Perſia, by enacting, that the nobility who debaſed themſelves, inſtead of being laſhed, which had been the practice, ſhould be ſtripped, and the whipping be given to their veſtments; and that, inſtead of having the hair plucked off, they ſhould only be deprived of their high-crowned Tiaræ.[s]

§. 6. There are two kinds of infamy, the one founded in the opinions of the people reſpecting the mode of puniſhment, the other in the conſtruction of law reſpecting the future credibility of the delinquent: the law of England was erroneous, when it declared the latter a conſequence of the puniſhment, not of the crime.[t]—There ſtill exiſt ſome unrepealed ſtatutes, which inflict perpetual infamy on offences of civil inſtitution.[u] But in general the rigour of this doctrine is now reduced to reaſon;[v] and it is holden that, unleſs a man be put in the pillory, or ſtigmatized, for *crimen falſi*, as for perjury, forgery, or the like,

[s] Plutarch.

[t] Co. Litt. 6. B.

[u] 2 & 3 Edw. 6.

[v] Gilbert's Law of Evidence, p. 143.

it

it infers no blemiſh on his atteſtation. It may be highly penal to engroſs corn, or to publiſh a pamphlet offenſive to government; but mercantile avarice, and political ſedition, have no connection with the competence of teſtimony; the credit of an oath can only be overballanced by the nature and weight of the iniquity. Such was the reaſoning of the Roman law. "*Ictus fuſtium infamiam non im-*"*portat, ſed cauſa, propter quam id pati me-*"*ruit; ſi ea fuit, quæ infamiam damnato ir-*"*rogat.*"[x]

§. 7. The Engliſh conſtitution, ever anxious to preſerve the virtuous pride of the people, hath uſed this branch of the penal code with a reſerve ſo ſcrupulous, that it may almoſt be doubted, whether more attention hath not been ſhewn to the protection of this principle, than to the preſervation of life: for corporal pains might certainly with good effect be ſubſtituted, in ſome caſes, in the room of capital judgments.

Yet, without any very ſtrict ſcrutiny into our ſtatute books, one may point out many

[x] Dig. 48. T. 19. §. 26.

proviſions ſtill exiſting, which are diſguſtful to humanity, and offenſive to common ſenſe.

It is eaſy to conceive, why the hand which gives a blow in a court of juſtice ſhould be cut off by edict of law; though it was at leaſt a condeſcenſion to minuteneſſes in that parliament, which, "to give more ſolemnity "to the operation," [y] ordered the maſter cook and ſerjeant of the larder to attend with dreſſing knives; the ſerjeant of the woodyard to furniſh a chopping-block; the yeoman of the ſcullery to attend with a pan of coals, and the ſerjeant farrier to bring hot irons to ſear the ſtump. But it is not ſo eaſy to acquieſce in the propriety of puniſhing a blow given in a church-yard, with the loſs of an ear; [z] though we are told, that it was intended to obviate the quarrels of proteſtants, and papiſts, at the firſt eſtabliſhment of the reformation. Under a ſimilar diſregard to relative propriety, Henry the Firſt ſeems to have enacted *quod falſarii monetæ oculos, et genitalia amitterent, abſque aliquâ*

[y] Stat. 33 H. 8. c. 12.

[z] 5 and 6 Edw. 6. c. 4. or, "having no Ears, the offender ſhall be branded with the letter F in his cheek.

redemptione,

redemptione".[a] Leſs abſurd was the conduct of Severus, who puniſhed a notary for the exhibition of a forged pleading, by ordering the nerves of his fingers to be cut, that he might never be able to write again; as was alſo a Law of Edward the firſt, how unjuſtifiable ſoever on account of its cruelty, againſt the third offence of theft from the lead mines in Derbyſhire; "that a knife ſhould be ſtruck thro' the hand of the criminal fixed on the table; and in this agony, and attitude he was to continue, till he had freed himſelf by cutting off his hand."[b]

The eighth of Eliz. ch. 3. puniſhes with impriſonment, and the loſs of the left hand, the ſending of live ſheep out of the kingdom, or the embarkation of them on board of any ſhip; and this too, without any exceptions of the neceſſary proviſions for the ſhip's crew: the ſecond offence is made only a clergeable

[a] Wilkins Leg. Angloſax pa. 304. Knyghton p. 2377. —and in the Annales de Margan ſub anno 1124. "Monetarii autem numero XCIV juſſu Regis in Normanniâ conſiſtentis die Epiphaniæ Genitalibus privati ſunt—and in the Records about the Time of the Conqueſt, it is very frequently ſaid in regard to other offences, that the convict "pro felionia ſua fuit occœcatus, et ementulatus et bona ſua eſchæt. Regi.

[b] Fuller—and Barr. 380.

felony.

felony.—Sir Edward Coke thinks,[c] that the benefit of clergy might be pleaded, as well in caſe of cutting off the hand, as in caſe of felony; if ſo, and if the offender were fortunate enough to have learnt to read, he could never have ſuffered under this act.

The 14th of Eliz. ch. 5. directed vagabonds to be ſeverely whipped, and burned thro' the ear with a hot iron, the compaſs of an inch; and for the ſecond offence to ſuffer death. This was a temporary act, and not continued in force.

It will not eaſily be credited by thoſe, who do not poſſeſs the Statute which I am about to mention, yet it is certainly true, that by *Stat.* 10. *Geo.* 3.[d] *ca.* 19. *A. D.* 1770, "every

[c] 3 Juſt. 104. Stamford 27 B. is referred to by Sir Ed. Coke, but I have not been able to find any ſuch opinion.

[d] It is remarkable, that this Statute was made at a time, when "the commentaries on the Laws of England" muſt be ſuppoſed to have been very recently peruſed by every Member of the Legiſlature. The writer of that admirable work hath, with peculiar anxiety, ſhewn "the neceſſity of not deviating any further from our ancient conſtitution, by ordaining new penalties to be inflicted upon ſummary convictions".

And ſurely, the corporal puniſhment of an Engliſhman, by the ſuffrage of one perſon only, is inconſiſtent with every idea of Engliſh Liberty. Yet this unſatisfactory

" perſon whatſoever, taking, killing, or de-
" ſtroying any hare, pheaſant, partridge,
" moor-game, &c. or uſing any dog, gun,
" &c. for that purpoſe, between an hour after
" ſun-ſetting, and one hour before ſun-riſing,
" and convicted thereof *before one* or more
" juſtice or juſtices, *upon the oath of one* or
" more witneſs or witneſſes; ſhall for the
" firſt offence be impriſoned, not leſs than
" three months, for other offences not leſs
" than ſix months; and either for the firſt,
" or any other offence *be once publicly whip-*
" *ped* in the town, where the goal or houſe
" of correction ſhall be, within three days
" from the time of his commitment between
" the hours of twelve and one o'clock in the
" day". And this is enacted even *without any reſervations, or diſtinctions, as to the rank, quality, or fortune of the offender.*

tory mode of trial was certainly inſtituted for the promotion of ſpeedy juſtice, and as a ſpecies of mercy to Delinquents; who, in trivial miſdemeanors, might otherwiſe be ruined by the expence and delay of frequent proſecutions by indictment: but it hath been extended in a degree truly formidable. The Courts Leet and Sheriff's Tourns are fallen into diſuſe, and the juriſdiction of individuals is aggrandized beyond meaſure: a juriſdiction, which, by its burthenſome conſequences becoming diſguſtful to men of fortune and education, too often falls into the hands of the mercenary and the ignorant.

The

The tacit diſapprobation of mankind conſigns ſuch laws to diſregard and oblivion: but they ſhould be repealed, to prevent every poſſibility of oppreſſion on the one hand, and to ſtifle all hopes of impunity on the other.

CHAP. VIII.

Of Fines.

§. 1. PEcuniary penalties form the laſt, and beſt claſs of thoſe ſalutary reſtraints of law, which alone render national liberty, either valuable or permanent. It is a wiſe and merciful inſtitution, which converts the little attachments of ſelfiſhneſs, into the ſtrong holds of ſociety. Let the inordinate ſallies of profligacy be controuled in their firſt efforts; and the frequency of capital, and corporal puniſhments will ſoon become unneceſſary: that frequency, ſo fatal to the preſent, and future happineſs of the ſufferers, ſo ſubverſive of every ſentiment of national benevolence.

§. 2. There exiſts however to this mildeſt mode of puniſhment a plauſible objection, which makes it ſeemingly repugnant to the genius

genius of a government, formed and ſupported on maxims of freedom: *the quantum of the fine muſt in moſt caſes be left to the diſcretion of the Judges.*

The value of money and property is ſubjected to daily and unforeſeen fluctuations: the circumſtances of the offenders, like the circumſtances of their offences, are infinitely various. It is impoſible therefore, in this age of refinement, to imitate the ſimplicity of the Ancient Britons; to annex ſpecific penalties to ſpecific claſſes of crimes, and to eſtabliſh a wholeſale traffic between criminals and courts of juſtice.

Howel Dda found no difficulty in ſaying [a], that the fine for murdering a Chancellor ſhould be 189 cows; for killing the Queen's cat, as much wheat as would cover her, when ſuſpended by the tail; for a perjury, three cows; for the rape of a maid, twelve cows; of a matron, eighteen; and in caſes of ſeduction, "*Vir, ſi factum denegaverit, jurabit ſuper campanam eccleſiæ malleo deſtitutam; quod ſi falſus fuerit, compenſabit denariis totidem, quot nates fœminæ operiantur.*"

[a] Leges Wallicæ, pa. 116.—pa. 202, &c.

I ſee

I ſee no reaſon, except what ariſes from their internal abſurdity, to doubt the authenticity of theſe laws; or to ſuppoſe, that they were not the moſt ſerious efforts of Welch Juriſprudence. For on this point, the ſame want of common delicacy, and common ſenſe, is very conſpicuous in the Inſtitutes of our good King Alfred[f]; and in the ancient Codes of the Burgundians, and of Sweden, and indeed of all the German nations. They had no ſettled rule of diſtinction between accidental damages, and intentional injury; between voluntary, and involuntary acts. "It was (ſays a learned Writer) the firſt indication of the approach of theſe nations towards politeneſs, that their compoſitions for injuries done to women were generally doubled".[g]

In ſhort, in the ages of imperfect civilization, "Juſtice ſeems to have been adminiſtered, merely to give a protection to the criminal againſt the party injured"[h]; and this protection was given to the former, in con-

[f] Leg. Angloſax, pa. 37.——Civil Reg. Sueciæ T. 11. ch. 12.

[g] Lord Kaims's Law-tracts, pa. 32, &c.

[h] L'Eſprit des loix, l. 20. ca. 20.

ſideration

ſideration of the fine, which the latter was obliged to receive. This was called a compoſition, and the reſentment of the offended family was cancelled. Such is the character given by Tacitus of the Germans. "*Suſci-*
"*pere inimicitias ſeu patris, ſeu propinqui*
"*neceſſe eſt: nec implacabiles durant; luitur*
"*enim etiam homicidium certo armentorum ac*
"*pecorum numero, recipitque ſatisfactionem tota*
"*domus*".

We find alſo in Homer frequent mention of the price of blood as paid to the Repreſentatives of the deceaſed; and the ninth book of the Iliad is founded entirely on the efficacy of preſents in the expiation of an injury.

§. 3. In the courſe of ſociety, riches muſt branch into very unequal proportions; and ſtated fines to ſpecified crimes muſt become ſubjects of mockery and indifference to ſome offenders, of ruin and deſolation to others and their families.

A modern Lawgiver ſhrinks therefore at the recital of the ancient amercements: he feels, that the Law on this point cannot, conſiſtently with reaſon, be fixed, and determinate.

nate. The enormity and tendency of the crime, the malice and wilfulneſs of the intention, the inconſiderateneſs and ſuddenneſs of the act, the age, faculties, and fortune of the offender, form a chain of complex queſtions; which can be reſolved only by the evidence of each ſeparate charge, and for which no human foreſight can provide.

Here then ariſes a neceſſary appeal to the breaſt of the judge; an appeal, which, under the families of Tudor and Stuart, became occaſionally the inſtrument of extortion and tyranny: but which was, even in thoſe reigns, (for the bill of rights was only declaratory of the old conſtitutional privileges) ſubjected by the law of England to ſuch wiſe regulations, and barriers, as ought to have ſecured to the ſubject every benefit of certainty.

It is the uſage of the courts, ſuperinduced on the clauſe of Magna Charta relative to civil amercements,[1] never to extend the fine of any

[1] Ca. 20. Liber homo non amercietur pro parvo delicto, niſi ſecundum modum delicti, et pro magno delicto amercietur ſecundum magnitudinem delicti, *ſalvo contenemento ſuo*, et mercator eodem modo *ſalvo mercandiſa ſua*, et villanus eodem modo amercietur *ſalvo wainnagio ſuo*, ſi inciderint in miſericordiam noſtram et nulla predictarum miſericordiarum

criminal ſo far, as to take from him the implements, and means of his profeſſion, and livelihood; or to deprive his family of their neceſſary ſupport. If the produce of his property, under thoſe humane reſtrictions, be thought inadequate to the degree of the offence, ſome corporal puniſhment is inflicted, or ſtated impriſonment: the impropriety of the latter, as a penal judgement, I have already obſerved. As a further ſafeguard againſt poſſible oppreſſion, all grants and promiſes of fines, and forfeitures, of particular perſons, before conviction, are illegal,[k] and void.

§. 4. The wiſdom of our Law, having thus amply ſecured the property, and perſonal freedom of the ſubject, hath rarely thought it adviſable to affix certain ſums to ſpecified crimes: I ſhall however mention one inſtance

cordiarum ponatur niſi per ſacramentum proborum hominum de viſneto, comites et barones non amercientur niſi per pares ſuos, et non niſi ſecundum modum delicti.

[k] Bill of rights, ſt. 1. W. and M. ſt. 2. ca. 2.—but it it was long before holden by Sir Edward Coke to be an illegal practice. "For when a ſubject obtaineth a promiſe "of the forfeiture, many times undue means and more "violent proſecution is uſed for private lucre, tending to "deſtruction, than the quiet and juſt proceeding of law "would permit, and the party ought to live of his own, "until attainder". 2. Inſt. 48.

to the contrary; which, on account of its ſingularity, is deſerving of ſome attention.

The 37th H. 8th, ca. 6. intitled, "the bill for burning of frames" and ſtill in exiſtence; for the better prevention alſo of "the cutting out of beaſts tongues, and the damms of ſtew-ponds; the cutting off the ears of his Majeſty's ſubjects, and the heads of conduit pipes; the barking of apple-trees, and divers *other like kinds* of miſerable offences, to the great diſpleaſure of Almighty God, and of the King's Majeſty"; gives treble damages, recoverable by action of Law, to the party injured, and a fine of ten pounds to the King's Majeſty.

This ſtatute wants no obſervation upon it; except, that I have not ſtated it on account of the equivocal idea of treble damages for an ear: treble damages have in all caſes the ſound of abſurdity, tho' not uncommonly preſcribed in ſtatutes, which give penal Actions.

§. 5. The excellence of the Penal ſyſtem conſiſts in the reaſonable ſelection of the objects of its coercion, in the moderate and judicious application of its penalties, in the perſpicuity

perſpicuity of its expreſſion, in the notoriety of its mandates, and in the certainty of its execution. But it may be rendered ſtill more perfect by the addition of certain ſalutary precautions, which favour in ſome degree of puniſhment, tho' intended in their general purport merely for the prevention of Crimes.

And here it is with pleaſure, that I take the opportunity of mentioning an inſtitution full of Wiſdom and Humanity, of ancient uſe in England, and very imperfectly known to any other Country. That wiſe inſtitution of our Anceſtors I mean, which, dividing the people into certain Claſſes, compelled the ſeveral Neighbourhoods or Diviſions of men to become mutual pledges for the good behaviour of the Individuals, who compoſed them; and conſequently, when any offence was committed within their diſtrict, either to produce the Offender, or become liable to ſuch penalty, as might be thought proportionable to the injury offered to the peace of Society. *Securitas fiebat, ſcilicet, quod de omnibus villis totius regni ſub decennali fide juſſione debebant eſſe univerſi; ita quod ſi unus ex decem foris-fecerit, novem ad rectum eum haberent:* [1] *ſumma et*

[1] Wilkins Leges Edward c. 20.

maxima ſecuritas, perquam omnes ſtatu firmiſſimo ſuſtinebantur!

The additional facility of mutual intercourſe between the different parts of the kingdom, the improving uniformity of language, which aroſe from this intercouſe in the provinces, the increaſing numbers of the people, and their unſettled inhabitancy occaſioned by the purſuit of commerce, ſeverally contributed to throw this plan of police into gradual diſuſe. In its original extent it is become perhaps impracticable; but ſome of its beſt veſtiges are ſtill viſible in our Laws.

In general, every perſon, as even a wife againſt her huſband, or a huſband againſt his wife, who hath cauſe to apprehend, that another will do any corporal hurt to him, hath a right to compel ſuch perſon to give ſecurity to a magiſtrate, that he will not do any act, that ſhall amount to a diſturbance of the peace; and this is called *a recognizance of the peace.*[m] It is in the nature of a conditional debt, payable only to the king, but in which both

[m] 1. Hawk. P. C. 126.—Commentaries B. 4. c. 18.

the

the king, and the ſubject are ſuppoſed to have an intereſt.[n]

The complainant muſt verify upon oath, that his application to the Magiſtrate is not made from motives of malice, or to give vexation; and, if the perſon complained of ſhall refuſe, or be unable, to find ſufficient ſurety, he ſhall be committed to priſon.

It is alſo uſual, upon the conviction of certain Miſdemeanours, to make *ſureties for the future good behaviour* of the offender part of the puniſhment. And it is holden under the Stat. 34. Edw. 3. c. 1. that the magiſtrate hath a diſcretionary power to take ſuch ſurety from all perſons of evil fame, or, in other words, whom he ſhall have juſt cauſe to ſuſpect to be dangerous, quarrelſome, or ſcandalous; as from thoſe, that ſleep in the day, and go abroad in the night; and ſuch as keep ſuſpicious company. All ſuch perſons are preſumed to have been in ſome degree criminal in their conduct; and conſequently to be the

[n] For which reaſon it ſeems an abſurd poſition in our law, that a recognizance may be diſcharged by the demiſe of the king; or that it may be releaſed by the party at whoſe complaint it was taken.

proper objects of that preventive juſtice, which is calculated for the amendment of offenders, the example of others, and the ſecurity of the ſtate.

CHAP. IX.

Of the Diſpoſal of the dead Body of the Criminal.

§. 1. THE Roman Law permitted the murderer to remain on the gibbet after execution, as a comfortable ſight to the friends and relations of the deceaſed.[o]

Nec furtum feci, nec fugi, ſi mihi dicat
Servus: Habes pretium; loris non ureris, aio.
Non hominem occidi: Non paſces in cruce corvos.[p]

The Moſaical Law directed the body of the criminal to be buried on the day of his death, "that the land might not be defiled".[q]

[o] Ut et conſpectu deterreantur alii, et Solatio ſit cognatis interemptorum. Ff. 48. 19. 28. §. 15. —and, A. D. 1741, when the Engliſh Regency made an order to hang the Murderer of Mr. Penny in chains, they inſerted therein "that it was on the petition of the relations of the Deceaſed. St. Tr. 18. 39.

[p] Horat. Epiſt. L. 1. ep. 16. v. 46.

[q] Deuteron. ch. 21. v. 23.

It

It cannot with any propriety be ſaid, that there is inhumanity, but it may be doubted, whether there be wiſdom, in the adoption, which the Laws of England have made on this point, of the reſcripts of the Emperors, in preference to the command of Moſes.

We leave each other to rot like ſcare-crows in the hedges; and our gibbets are crouded with human carcaſes. May it not be doubted, whether a forced familiarity with ſuch objects can have any other effect, than to blunt the ſentiments, and deſtroy the benevolent prejudices of the people?

§. 2. The ignominious burial of perſons guilty of ſuicide might perhaps, if ſtrictly executed, form ſome check on the ſin of ſelf-murder; but, in this caſe, Juries are generally more influenced by the momentary impulſe of compaſſion, than by a proper attention to the general benefit.

§. 3. To the diſſection of criminals it is impoſſible to offer any ſolid objection. Modern ages will confine it to the dead, and turn a deaf ear to the anatomiſt, who laments the Æra of his own exiſtence, "*Ubi, præ*

iniquitate temporum, vivos homines dissecare non licet".[r]

§. 4. There is a seeming liberality of sentiment in the proposal, to subject certain classes of criminals to medical experiments for the benefit of mankind. England was by these means enabled to extend inoculation through Europe, and consequently to save the lives of millions.

I am apprehensive, that I dissent from a very learned writer,[s] when I assert, that such a plan can never with any propriety receive the legislative sanction.

If the experiments be without hazard, they are unnecessary; because equally practicable on the innocent and on the guilty: if of a nature to maim and disable; they are cruel and impolitic; if dangerous to the life; the uncertainty of the event destroys all the solemnity of the example in the eyes of the people. The criminal himself too expects the decision, under all the heated anxiety of a gambling

[r] Vide Corn. Cels. in præfat.

[s] Observations on the ancient Statutes, pa. 353.

adventurer;

adventurer; and meets the perils of death in a ſtate of mind, very unſuitable to the dictates and temper of Chriſtianity.

The modern advancement of medical knowledge, and the benevolence of its profeſſors, make ſuch aids uſeleſs and ineligible.

CHAP. X.

A General Idea.

WHEN we follow the unreſtrained courſe of our thoughts, inſtead of laying down premiſes, and deducing concluſions from them, we reaſon from concluſions only: we begin our reſearches at the mouth of the ſtream, and thence inveſtigate the ſpring.

The political liberty of a ſtate conſiſts in the ſecurity of the people; that ſecurity bears a proportion to the juſtice, and wiſdom of the penal code, which protects innocence by the chaſtiſement of guilt. The juſtice, and wiſdom of every penal law depend on its analogy to the particular quality of the crime, to which it applies. The puniſhment then becomes

comes an eſtabliſhed conſequence, unconnected with the caprice of authority, and flowing from the very nature of the offence.

It is not ſufficient therefore to have ſtated the right of puniſhment, and the different claſſes of puniſhments; it is alſo neceſſary to conſider the ſeveral ſpecies of crimes, their definitions and gradations.

The ſuperſtructure, as the moſt ſtriking object, firſt caught my attention; it remains to examine the foundation.

CHAP. XI.

Of Crimes.

§. 1. CRIME is diſtinguiſhable from ſin:[t] for every crime muſt be a poſitive breach, or wilful diſregard, of ſome exiſting public law. But many offences againſt earthly authority are no otherwiſe ſinful in the eye of Heaven, than as infractions of that implied

[t] This diſtinction, ſays a learned writer of the laſt century, was known both to the Greeks and Romans, in the words ἁμαρτημα, ἐκλημα. Peccatum, Crimen.

contract

contract of obedience to the legiſlature, to which every member of ſociety is ſubjected: and there are many ſpecies of ſin, which, in a legal ſenſe, cannot be criminal, becauſe in their nature not obvious to human accuſation.

§. 2. The mere ſpeculative wantonneſs of a licentious imagination, however dangerous, or even ſanguinary in its object, can in no caſe amount to a crime. It is a paſſion inſeparable from the eſſence of the human mind, to delight in the fiction of that, the actual exiſtence of which would pleaſe.

Dionyſius the tyrant is ſaid to have puniſhed by death one of his ſubjects, for dreaming that he had killed him. This was not more iniquitous, than the execution of the gentleman,[a] who, having a white deer in his park, which was killed by Edward the fourth, wiſhed the deer, horns and all, in the belly of him that counſelled the King to kill it; whereas in truth no man counſelled the King to it: or than the attainder, and execution of Algernon Sydney, on the evidence of private,

[a] Markham Ch. J. rather choſe to quit his office, than conſent to this. Baker's Chr. 229. Hale's Hiſt. P. C. 1. 115.

and

and unpubliſhed papers, without any proof, or even a ſuggeſtion of their intended publication; without even an averment, that they were relative to the treaſonable practices charged in the indictment.[y]

§. 3. Crimes have no exiſtence prior to the reſolution to do ſome criminal act, and are puniſhable only when that reſolution is capable of proof: but criminality even in this ſtage is only inchoate, and in all caſes therefore, except treaſon, is treated with a moderated ſeverity by our law; which benevolently ſuppoſes a poſſibility of recollection, and repentance, previous to the actual completion of the deſign.

This poſſibility was excluded by ſtat. 25 Eliz. which made it felony "to wiſh or de-" ſire the death, or deprivation of the Queen, " *or any thing to that effect.*"

Qui deliberant, deſciverunt, ſaid Tacitus. Sir Heneage Finch gave a bloody interpretation to this expreſſion, when he inferred,[z] that "to " doubt or heſitate in a point of allegiance, is " direct treaſon and apoſtacy."

[y] In which caſe it is thought, that they might have been read in evidence. Foſter p. 191.

[z] Vol. 2. p. 230.

When

When the will is ſaid to be equivalent to the deed, it ſhould always be underſtood, that there hath been actual, determinate endeavour, ſo far co-operating with the intention, that no new exertion of the mind could have intervened to prevent the effect of the crime,[r] tho' that effect may caſually have failed; as if a man ſhould ſtab another with intent to kill, though by the ſkill of the ſurgeon the wound ſhould not prove mortal, or diſcharge a bullet at his head, though he ſhould miſs his aim.

§. 4. Thus every criminal charge muſt be founded on ſome fact, with the evidence of which every tryal ſhould commence. If that fact be eſtabliſhed beyond the power of refutation, it then becomes neceſſary for the perſon accuſed to have recourſe to the ſeveral ſuggeſtions, which are allowed by reaſon, morality, and religion, to be matters of mitigation or excuſe.

We find in every ſyſtem of laws a great variety of elaborate diſtinctions, on the different gradations from the completeſt guilt, which is the accumulated reſult of both fact

[r] Puffendorff p. 782.

and

and intention, to innocence, which conſiſts in a total deficiency of a miſchievous will.

The colour of the accuſation aſſumes a new tint, whether the perſon accuſed be reſponſible, as principal or as acceſſory; whether principal in the firſt degree as actual perpetrator, or in the ſecond as aiding and abetting: whether as acceſſory before the fact, or after; whether juſtifiable on the ſeveral pleas of misfortune, ignorance, or compulſion: laſtly, if there be a want of diſcernment, or underſtanding, there cannot exiſt a malignity of mind; for ſuch perſons the law itſelf ſhould anxiouſly apologize, on the appearance of their incapacity; whether it ariſes from the courſe of nature, as in the nonage of infants; or from the viſitation of God, as in the caſes of ideots and lunatics.

But when the meaſure of proof is full; when the act and intention[x] have both co-

[x] By the common law, *an intention to commit a felony amounted to the ſame crime in no inſtance.* As in the caſe of Holmes, who ſet fire to his own houſe in the city of London, with intent to burn the houſe of his neighbour: but as the fire did not extend beyond his own houſe, this was adjudged not to amount to the crime of Arſon. I ſhall hereafter have occaſion to mention ſome particular ſtatutes which depart from this rule. Holmes's caſe is in Cro. Car. 377.

operated

operated to eſtabliſh the guilt of the offender; when every poſſibility of extenuation or excuſe is precluded; then, and not before, let the arm of juſtice be ſtretched forth, and let that penalty be rigorouſly inflicted, which the law hath proportioned to the denomination and degree of the crime.

§. 5. It is impoſſible to delineate any ſyſtematic, or graduated ſcale of crimes, applicable to every legiſlation; for crimes are of temporal creation, and to be eſtimated in proportion to their pernicious effects on ſociety. Municipal laws muſt be adapted to the temper and influence of the climate, the ſtate of commerce, the occupations, number, and riches of the people; in ſhort, to the nature, principles, and neceſſities of each particular government. The ſame fact is therefore liable to a different conſtruction under every different legiſlation. Solon made idleneſs a crime; and this, in the infancy of a democracy ſo well regulated as that of Athens, was not unreaſonable. In Holland it is a capital crime to kill a ſtork; but ſuch a proviſion in the dry, mountainous parts of Germany would be groſsly abſurd. The ſafety of the ancient Gauls conſiſted in the mere brutal activity of their bodies:

dies: it was criminal therefore, ſays Strabo, and puniſhable, for the young men to exceed the meaſures of their girdle; for it was conceived to be a proof of idleneſs and gluttony. In the warmer countries, which want the reſtriction of the true religion, we ſee polygamy eſtabliſhed, or the uſe of ſeraglios permitted. Lawgivers are but men; and the wiſeſt of them will too often be influenced by their conſtitutional paſſions, though perhaps inſenſibly, in the laws they frame. But in the temperate climate, which we inhabit, where the ſexes are equally qualified for the pleaſures of ſentiment; and where it is not unuſual for the wife, the miſtreſs, and the friend, to exiſt in the ſame perſon; ſuch pluralities would as ill agree with the temper and diſpoſition of the people as with the dictates of the religion they profeſs.

§. 6. Crimes then being relative to the nature of each particular government, they are incapable of general definitions: but it is very poſſible to eſtabliſh certain leading principles, which ſhould be ever preſent to the attention of human juriſdictions.

The

The Preſident de Monteſquieu hath conſidered crimes, as prejudicial to religion, to morals, to the tranquility of the public, and to the ſecurity of individuals. This diviſion ſeems liable to objections, though it may not be eaſy to make a better. I ſhall avoid therefore the arrogance of the attempt, by purſuing the detail without any methodical diviſion of the ſubject.

CHAP. XII.

Of Crimes relative to Religion.

§. 1. RELIGION hath been wiſely eſtabliſhed by law, as uſeful and neceſſary to ſociety; and is ſo wrought into the very frame of our government, as to become a main part of the conſtitution. The magiſtrate therefore, though the well being of the ſtate be his peculiar object, is by no means exempted from a due concern for the religion of his country.

§. 2. But it is no conſequence from hence, that men ſhould be debarred liberty of conſcience, and the free uſe of reaſon and inquiry; much

much leſs can any argument be drawn from it in favour of perſecution. Freedom of thought is the prerogative of human kind; a quality inherent in the very nature of a thinking being; a privilege which cannot be denied or taken from him. Montaigne therefore had good cauſe for ſaying, in his familiar way, "that "it is ſetting up ones own opinions very "high, to direct another to be roaſted alive "for them." He ſpoke feelingly; for all the ſtates of Europe were at that time blazing with religious martyrdoms: and it ſeemed to be the fundamental principle of all ſects to execrate and extirpate each other.

Even England, the ſeat of national liberty, and benevolence, became the bloody ſcene of intolerance and perſecution; the miniſters of peace and chriſtianity were the active diſpenſers of death and deſolation; and the perpetrators of the moſt malignant murders were clad in the pure mantle of religion.

The accompliſhed and ſentimental Sir Thomas More cauſed Lutherans to be whipt, tortured, and burnt alive in his preſence. Cranmer led Arians, and Anabaptiſts to the ſtake. Bonner, Biſhop of London, tore off the beard

of

of a weaver, who refuſed to relinquiſh his tenets; in another inſtance of the ſame kind he ſcourged a man until his arm ached with the exerciſe; and held the hand of a third to the candle, to give him a ſpecimen of burning, till the ſinews and veins ſhrunk and burſt. Even Wriothesly, the Chancellor of England, directed a young and beautiful woman to be ſtretched on the rack, for having differed with him on the real preſence; with his own arm he tore her body almoſt aſunder, and cauſed her afterwards to be committed to the flames. In fine, infants, born at the ſtake, were thrown into the fire with their parents, as partaking of the ſame hereſy.

Human nature appears deteſtable under ſuch repreſentations; which are well deſcribed by a philoſophical writer, to ſink men below infernal ſpirits in wickedneſs, and below beaſts in folly.

Henry the 8th, whoſe caprice was the bloody ſtandard of the national faith,[a] ruled all ſects by turns with a rod of iron: his ſcholaſtic ſubtlety was equal to his cruelty;

[a] It was made high-treaſon *to believe* this Prince to have been married to Anne of Cleves.

and we are told, that, in one inſtance, he found ſufficient reaſons for ſending three papiſts with three proteſtants, their companions, in the ſame proceſſion to the ſtake. His daughter Mary, with leſs ingenuity, poſſeſſed the ſame rancorous and implacable zeal. We accordingly learn, that in the ſpace of three years, under the auſpices of Biſhop Gardiner, ſhe committed two hundred and ſeventy-ſeven proteſtants to the flames. Human ſacrifices were at this period more frequent in the metropolis of England, than they had ever been in either Carthage, or Mexico: and in all theſe inſtances, the future damnation of the heretic was believed to be the inevitable conſequence of his death.

Ye rev'rend fathers,
Whoſe beards the ſilver hand of time had touch'd,
Whoſe learning, and good letters peace had tutor'd,
Whoſe white inveſtments figur'd innocence
The dove, and very bleſſed ſpirit of peace,
Wherefore did ye ſo ill tranſlate yourſelves
Out of the ſpeech of peace, that bears ſuch grace,
Into the harſh and boiſt'rous tongue of war,
And civil maſſacre? who ſhall believe
But ye miſus'd the rev'rence of your place,

But

Under the counterfeited zeal of God,[c]
In deeds moſt damnable?[d]

This frenzy had ſubſiſted here for more than a century:[e] I find the following account of the execution of Lord Cobham. A. D. 1418.

" Than was he layd upon an hurdle, *as* " *though he had been a mooſt haynouſe traytoure to* " *the crowne* and ſo drawne forth into Sainct " Gyles Felde, wheere as they had ſet up a " new paire of Galowes. than he was " hung up in a chayne of yron and ſo con- " ſumed alyve in the fyre, *and ſo he departed* " *hence mooſt chriſtenly*. how the prieſtes " that tyme fared and curſed, requiring the " people not to pray for hym, but to judge

[c] Deorum numen prætenditur ſceleribus. Liv. 39. c. 16.

[d] Shakeſpeare.

[e] But it appears from Godfridus Colonienſis, who wrote A. D. 1234, to have prevailed much earlier on the Continent. " Eodem die, quo quis accuſatus eſt, ſeu juſte, " ſeu injuſte, nullius appellationis, nullius defenſionis refu- " gio proficiente, damnatur et flammis injicitur." This was founded on the following conſtitution of the Emperor Frederic. " Damnati per eccleſiam judici ſæculari relinquentur, animadverſione debitâ puniendi, clericis a ſuis ordinibus primo degradatis. See alſo Mat. Paris, p. 429, and Hales Hiſt. P. C. 1. 383.

" hym damnned in hell, for that he departed " not in the obedience of the Pope, it were " too long to wryte.[r]

The writ *de Hæretico Comburendo* ſeems to have been founded on the 2 Hen. 4. c. 15: it was firſt uſed with effect againſt William Sawtre, A.D. 1401, who had been condemned for hereſy by the Convocation of Canterbury, and whoſe ſentence had been confirmed by the Houſe of Peers: it concluded in the following words, " *ac ipſum hæreticum in eodem igne realiter comburi facias, in hujuſmodi criminis deteſtationem, aliorumque Chriſtianorum manifeſtum exemplum.* This writ was iſſued ſo late as the year 1611, by James the Firſt, againſt Bartholomew Legat,[s] an Arian, on a conviction before the Ordinary. Having ſubſiſted three centuries, it was at laſt aboliſhed with all proceedings thereon; and all capital puniſhments in purſuance of eccleſiaſtical cenſures by 29 Ch. 2. ca. 9. It is perhaps to be wiſhed, that this ſtatute had gone one ſtep further, and

[r] See the tryal and examination of Sir John Oldcaſtle collected by John Bale.

[s] On which occaſion it was adjudged by Heming, Tanfield, Williams, and Croke, that the Dioceſan may convict of hereſy, and that thereupon the writ de hæretico comburenda may iſſue. 12 Co. Rep. 92.

taken

taken from the ſpiritual arm every exerciſe of penal juriſdiction.

I have given this detail of hiſtorical facts, merely as a ſubject of curious ſpeculation. The banners of pious cruelty ſeem now to be for ever laid aſide. Philoſophy and benevolence are become the companions of religion.

§. 3. Still however, and conſiſtently both with reaſon and civil liberty, all intentional affronts to the national rites, and all manifeſt impieties vauntingly committed, are conſidered as criminal, and in their nature ſubject to the ſecular cognizance: yet not as crimes immediately fatal to ſociety, and calling for the extirpation of the Criminal; but as infractions of the public tranquility and diſturbances of the eſtabliſhed ſyſtem.

The Engliſh legiſlature is now aware, that it is not the office of the magiſtrate to ſtir up the zeal, and blow the coals of perſecution; that ſeverity ought not in any inſtance to be extended to the peaceable exerciſe of different opinions; that the Law ought not to be made the ſcourge of conſcience, nor compulſion to be added to intolerance. Miſdirected piety is no longer within the province of our tribu-

nals; tho' ſometimes, from the principle of the civil eſtabliſhment, properly ſubjected to certain civil diſabilities.

" Hear this ye Nations", and let not in any caſe the ſacred truths of the Goſpel be forced upon mankind by the contaminated hand of the executioner: let not in any caſe an unhappy attachment to hereditary religious errors, confirmed by the prejudices of education, be made a capital crime. The attempt to over-power by terrors the miſapprehenſions of the mind is unnatural and preposterous. Uniformity in opinion cannot be the reſult of force; general orthodoxy cannot be the creature of mandatory Law; nor can " *the pains of death in ſupport of religion ever have any effect but to deſtroy*".[h]

§. 6. It would be uncandid however not to confeſs, that the Laws of England at this day ſubject Popiſh Prieſts, in many caſes, to perpetual impriſonment;[i] in others, to the pains of high-treaſon. It is alſo high-treaſon[k] to pervert, *or even to be perverted*, to the ſee

[h] L'Eſperit de Loix.

[i] Stat. 27. Eliz. c. 2.

[k] 3. Ja. 1. ca. 4.——23. Eliz. ca. 1.

of

of Rome. A ſecond refuſal to take the old oath of Supremacy is liable to ſimilar ſeverity.[1] Such Laws are rarely exerted; but their exiſtence is a national reproach.

A free government may naturally hold in abhorrence a religion, the principles of which are founded in ſlavery; but a free government forgets its own principles, when it gives to involuntary opinion, the denomination and puniſhment of the moſt enormous guilt.

In that age of bigoted enthuſiaſm, when eccleſiaſtical tyranny was placed in competition with civil government; and when it was attempted with impudent, and unwearied diligence, to ſubject the internal Sovereignty of the realm to the ſuppoſed univerſality of the Papal power; the indignation of our anceſtors was at length awakened; and the unnatural poſition of "*imperium in imperio*", was encountered by many ſharp and ſevere Laws. The motive hath ceaſed, but the effects remain: and our ſtatute books are at this day crouded with inflictions of forfeiture, and perpetual impriſonment, (under the name of præmunires) on Papal proviſors, importers of

[1] 5. Eliz. ca. 1. §. 11.

any

any *Agnus Dei*, croſſes, beads, or other commodities of the church of Rome. Can it be a queſtion, whether theſe laws ought not alſo to be repealed?

§. 7. Sorcery, by the conſtruction of the common Law, was a ſpecies of hereſy.[m] Under this idea, A. D. 1441, the writ *de hæretico comburendo* was iſſued againſt Margery Goodman of Eye in Suffolk; and ſhe was accordingly burnt for conſultation with the Devil. Witchcraft alſo, was treated with extreme ſeverity in very early times: in Scotland,[n] A. D. 840, a Law was made to puniſh it by cutting out the tongue; and in England, by the laws of Æthelſtan, A. D. 928, it was made a capital crime.[o] We find a preſent-

[m] Sorcery et Devinal ſont membres de hereſie. Mirror ca. 1. §. 5. Fleta.—"Chriſtiani apoſtatæ, ſortilegi, et *hujuſmodi* comburi debent". The word "hujuſmodi which in this ſentence ſeems of a very alarming Nature, is not more exceptionable than certain expreſſions, which frequently occur in the Engliſh Statutes: ſuch as "*divers other like kinds of miſerable offences.*" "*Any thing to the ſame effect.*" *Other offences of the like ſort, &c.*" We frequently find the ſame vague appendix in the Roman Law. "*Aliudve quid ſimile ſi admiſerint.*"

[n] Concil. Brit. pa. 341.

[o] See alſo a Law temp. Hen. 1mi. in Lambard, ca. 71. William of Neuburgh who wrote A. D. 1181, gives a very grave account of a witch who obtained a victory at ſea

ment of ſorcery *inter placita Reg. Rich.* 1*mi*; and in the year Books there is an appeal of Necromancie in the 18th year of Edw. 2d; there are alſo many ancient writs in Rymer *de ſortilegis capiendis*. It ſuited the ſanguinary temper of Henry 8th, as well as the pedantry of James the firſt, to give written deſcriptions of this offence; we accordingly find very learned edicts againſt prophets, Sorcerers, feeders of evil ſpirits, charmers, and provokers to unlawful love.[p] Sir Edward Coke thinks,[q] "that it would have been a great defect in government, to have ſuffered ſuch deviliſh Abominations to paſs with impunity". But the lawgivers of this generation have prohibited [r] all proſecutions of a crime which doth not appear to have any exiſtence; and have by the ſame ſtatute ordered all pretenders to

ſea in favour of Suerus King of Normandy, by commanding the waves to ſuck in the greateſt part of the adverſe fleet, "which was accordingly done". pa. 236.

On the 23d of Auguſt, 1728, ſeveral perſons were burnt alive at a town in Hungary, *becauſe* a large woman, who had confederated with them in the Art of witchcraft, did not, when put into the ſcale, weigh more than four ounces.

[p] See the Roman Law de his qui amatorium poculum dant. Plutarch alſo exclaims warmly againſt women uſing "τα φιλτρα ὁτι δειγερτικα εις τα κατ' Αφροδιτην."

[q] 3. Inſt. 45.

[r] 9. Geo. 2. ca. 5.

ſuch

ſuch preternatural abilities, to be exalted on the pillory above the reſt of mankind. *That knavery, which endeavours to impoſe on credulity, is ſurely a proper object of correction*; for which reaſon alſo, falſe and pretended prophecies are properly puniſhable, tho' they are too frivolous in their nature to require any extraordinary ſeverity. They were puniſhed capitally by 1. E. 6. c. 12, which was repealed by Q. Mary: and now, by 5. Eliz. c. 15. the penalty for the firſt offence is a fine of 100l. and one year's impriſonment; for the ſecond, forfeiture of all goods and chattels, and impriſonment for life.

§. 8. It is not improper, under the title of this chapter, to conſider crimes relative to marriage; which, tho' a civil inſtitution, is ſtampt with the ſeal of religion.

Inceſt,[s] and adultery,[t] are vices ſo contrary to the well being of a great and poliſhed ſtate, that one may wonder at the ſupineneſs of the Engliſh Law, which hath not ſubjected either,

[s] Tune ſoror nati, genetrixque vocabere fratris,
Nec quod *confundas et jura et nomina ſentis.*
Ovid Metam.

[t] Oppida cæperunt muniri et condere leges,
Ne quis fur eſſet, *neu latro, neu quis adulter.* Horat.

as

as crimes, in any inſtance, or in any degree, to the temporal cognizance. Adultery is perhaps puniſhable by indictment,[u] as a ſcandalous and public indecency, but in no caſe as the infraction of a ſacred tie, and tending to a general diſſoluteneſs of manners.

This offence among the Saxons was puniſhed by a fine, called Lecherwite, and Legergeldum. And we find in the Domeſday book, "*quod adulterium faciens* 8*s* 4*d emendabit homo, et fœmina tantundem: Rex habet hominem adulterum, Archiepiſcopus fœminam*". The Julian law of the Romans puniſhed it alſo by fine; the law of Moſes [w] with death. Women committing adultery were by the Egpytians deprived of their noſes, that they might not again allure men to wantonneſs; I cannot learn that male offenders were liable to any corporal penalty. The wife's tranſgreſſion in this reſpect is certainly more repugnant to the end of marriage, than the huſbands; yet the ſex of lawgivers influences the modes of puniſhment. A female Legiſlature, however inclinable to eradicate this offence, would

[u] Comberbatch, 377.—Tremaines pleas of the Crown, pa. 209, and pa. 215.—State Tryals, v. 3. p. 52.

[w] Levit. 20. 10.

hardly

hardly have had recourſe to mutilation, as the moſt eligible expedient for that purpoſe.

§. 9. It is made a felony by a late ſtatute to ſolemnize clandeſtine marriages.[x] The crime is indeed prejudicial in its conſequences to the public police and œconomy: yet it might perhaps have been ſufficient to have made all ſuch marriages void, or to have ſubjected the offender to pecuniary forfeitures, or civil diſabilities.

§. 10. Polygamy is alſo a felonious offence in our law[y]; and, by the laws both of ancient, and modern Sweden, is puniſhed with death. It certainly is a groſs ſpecies of adultery, aggravated by the profanation of a religious rite; yet the law, which ought to look upon the individuals of the community with the eyes of a mother upon her children, ought to be very ſparing of the higheſt ſeverities, when the milder claſs of reſtrictions may ſuffice. In France it is puniſhed by ſentence to the gallies, or by temporary baniſhment.

[x] 26. Geo. 2. ch. 33. [y] 1. Ja. 1. ch. 11.

ancient

By the ancient law of England, Chriſtians marrying Jews were *burnt* [a] alive.

§. 11. Sacrilege formed a very extenſive article in the Roman law, and was accounted more odious than treaſon.[a]—The Engliſh ſtatute book draws no diſtinction of guilt from the holineſs of the place, or perſons offended; except in the crime of robbing a church, or chapel, which is excluded from the benefit of clergy by an act of Henry the 8th; the fact however muſt be accompanied by an actual breaking.[b] By an Athenian law,[c] a man committing this offence was baniſhed with all his children. It was alſo a maxim of the civil law, *quod delicta capiunt incrementa a loco, ſive ratione loci in quo committuntur*.[d] By the laws of King Canute,[e] "if murder be committed

[a] I have tranſcribed this expreſſion from Sir Edw. Coke, 3. Inſt. 89. but it is evidently a miſtake. "Contrahentes cum Judæis, Judæabus, pecorantes, ſodomitæ, vivi confodiantur. Fleta L. 1. ca. 35.

[a] Proximum ſacrilegio eſt quod Majeſtatis dicitur. L. 1. Ff. Leg. Jul.

Yet we are told that in the temple of Diana at Aricia near Rome, whoever killed the chief prieſt was entitled by law to become his ſucceſſor;—a moſt unaccountable privilege.

[b] 2 Hawk. 351.

[c] Meurſius L. 2. ca. 2.

[d] Ff. L. 16. §. 5.

[e] Lambard's Collection Law 2d.

in

in a church, a full compenſation ſhall be paid to Jeſus Chriſt, another full compenſation to the king, and a third to the relations of the deceaſed". And in the 8th year of Edw. 4th, it was attempted [f] to make ſacrilege high-treaſon, ſubjecting the offender to be burnt. A petition, the common method of tendering bills for the royal aſſent, was preſented to the king for that purpoſe by both houſes. To this extraordinary requeſt the king returned an anſwer, becoming the royal majeſty of the crown, " *Le Roy s'aviſera*[g]".

CHAP. XIII.

Of Crimes relative to the Law of Nations.

§. 1. THE law of nations is founded partly on the ſuggeſtions of natural equity, partly on poſitive ſtipulations. It is univerſal in its extent and operation through the civilized world; and ſupported by the general conſciouſneſs of its general Utility.

[f] Cotton 684. [g] Foſter pa. 192.

Individuals

Individuals are required to give their acquieſcence to this law, not as a matter of choice, but of obligation; and it is the province of legiſlators to force that acquieſcence, if kept back or neglected. For the faith of nations in their collective capacities would be of little avail, if private ſubjects were allowed to uſe hoſtilities, and treachery towards each other; mutual diſtruſt, inſecurity, diſcord, and war would follow. *Vim volumus extingui? jus valeat neceſſe eſt*[h]. If the views of each individual were permitted to terminate in ſelfiſhneſs, the miſery of all would be the conſequence; the ſtability of a building depends on the united ſupport of its correſpondent parts.

This law becomes preciſe, and definitive in proportion to the continued intercouſe of nations,[i] and the complication of their mutual connections. I am not however to conſider thoſe multifarious rules of equity, which have been tacitly eſtabliſhed in the conduct of war and commerce; ſuch as, declarations previous

[h] Orat. pro Sext. ca. 42.

[i] Quam legem exteri nobis poſuerunt, eandem illis ponemus. Stierhook de jure Sueonum, l. 3. ch. 4.

to hoſtilities, the prohibition of poiſoned weapons, Capitulations, ſafety of hoſtages, ſuſpenſions of arms, maintenance of truces, the privileges, regulations, and reſtrictions of merchants. I confine myſelf merely to the penal cognizance of ſtates internally reſpecting the rapaciouſneſs and malice of natives in their conduct towards Aliens. The crimes founded thereon are reducible to a ſmall compaſs.

§. 2. Offenders againſt the rights and privileges of Embaſſadors by arreſt, or diſtraint, are deemed violators of the Law of Nations; and, by a modern act,[k] made liable to ſuch penalties, or corporal puniſhment, *as the Chancellor, and the two Chief Juſtices ſhall think fit*[l]: a ſtrange, and unlimited diſcretionary power! abhorrent from the principles of a free government; unlikely indeed to be abuſed, but improper to be given. It would be eaſy to eſtabliſh a leſs exceptionable ſanction to that

[k] Stat. 7. Ann. c. 12.

[l] The ſame indefinite legiſlative Authority, as to military puniſhment, is annually given to the King by the Mutiny-Act, which gives power to "his Majeſty, to form Articles of War, and conſtitute courts martial, to try any crimes by articles, and inflict ſuch penalties as the articles direct". But this cannot be extended to affect life or limbs. Commentaries 1. 415.

reverence

reverence, which is due to the repreſentatives of kings. This Act is ſaid to have been made under mortifying circumſtances, as a kind of public ſatisfaction to the Czar Peter; whoſe embaſſador, Mateof, had been arreſted in London for debt, and obliged to get the other foreign miniſters to give bail for him. It ſeems hardly credible, that the characters of embaſſadors ſhould have wanted this ſanction in England in the 18th century. Mr. Whitworth was alſo ſent with a ſolemn apology to the Czar, in which he told him, ſays Voltaire,[m] "that the Queen had impriſoned the perſons, who had preſumed to arreſt his Ambaſſador, and that the delinquents had been rendered infamous;" Aſſurances, which had no foundation in fact.

§. 3. Truce-breakers, and violators of ſafe conduct are by a ſtatute of Henry the 5th declared guilty of high-treaſon againſt the King's crown, and dignity.[n] It ſeems to be the better opinion,[o] that this was repealed by the ſubſequent ſtatute of Edward the 6th, and Mary. The puniſhment was certainly extravagant;

[m] Hiſt. de Ruſſ. ch. 19.
[n] 2. Hen. 5. c. 6.
[o] Commentaries B. 4. pa. 70.

but the milder law of Henry the 6th relative to the ſame crime,[p] which ſtill remains in force, is too vague and indeterminate.

Commercial countries naturally ſhew a peculiar tenderneſs to the perſons and property of foreigners. It is a beautiful circumſtance, ſays Monteſquieu, that the Engliſh nation made the protection of merchant ſtrangers a principle article in the great charter of her liberties[q]:" The moſt benevolent indulgence was alſo ſhewn by our law to the proprietors of diſtreſſed and wrecked veſſels, at a very early period, when it was permitted to other nations, *in naufragorum miſeriâ et calamitate tanquam vultures ad prædam currere.*[r] This ſubject is certainly connected with the law of

[p] 31. H. 6. c. 4.

[q] There was a degree of national wiſdom in the clauſe to which Monteſquieu alludes, and which may be found in 9. H. 3. c. 30. It muſt however be acknowledged, that the internal Hoſpitality of England doth not appear to be of great Antiquity. I ſhall tranſcribe a part of the oath, which Bracton records, as neceſſary to be taken by all perſons above fifteen years of age. " Jurabunt etiam, quod nullum de nocte recipient in domum ſuam ad hoſpitandum, niſi bene notus ſit: et ſi forte ignotum aliquem hoſpitaverint, quod non permittent eum in craſtino recedere ante clarum diem, et hoc ſub teſtimonio trium vel quatuor virorum. L. 3. c. 3.

[r] Stiernhook l. 3. c. 5.

nations;

nations; but I ſhall only obſerve further upon it, that it hath been thought neceſſary by a very modern act, to make all plunderers of diſtreſſed or ſtranded ſhips guilty of felony without benefit of clergy.[t] This act was indeed eſſentially neceſſary to infer criminality on the plunderer; ſince Larceny could not at common law be committed of treaſure trove or wreck, till ſeized by the King, or him, who hath the franchiſe; for till ſuch ſeizure[u] no one hath a determinate property therein.

If ſtealing furniture, above the value of twelve-pence from lodgings, required the puniſhment of death[w]; the plundering of wrecks, aggravated as it is by the unfeeling neglect of that ſacred reſpect which is due to the unfortunate, certainly is not entitled to mercy. But arguments from analogy lead to bloody conſequences in the framing of penal laws. By the code of the Viſigoths, he, who took the opportunity of fire or ſhipwreck to ſteal goods, was obliged to reſtore fourfold.[x]

[t] 26. Geo. 2. ch. 19.

[u] 1 Comment. 4. 234.

[w] 3. and 4. W. and M. ch. 9.

[x] L. 7. Tit. 2. §. 18.

The above mentioned act hath made it a capital offence to put out falſe lights, with intention to bring any ſhip into danger. The crime is undoubtedly heinous in its nature, and may be dreadful in its conſequences; but the puniſhment of death ſhould be inflicted rarely and with great caution upon the Intention, where it is not followed by its Effect. The 8th of Queen Elizabeth thought it ſufficient to puniſh the deſtroyer of ſtated ſea-marks with a penalty of a hundred pounds or outlawry.

§. 4. Piracy is a ſpecies of robbery, or unauthorized depredation on the ſeas. The wars of nations are in all caſes unhappy, but often legitimate, even when offenſive, being founded in the principles of ſelf-preſervation. For the life of nations reſembles the life of man, and the right of ſelf-preſervation frequently induces the neceſſity of beginning the attack. It is not ſo with freebooters and pirates, who are to be conſidered as unprovoked enemies, or rather as beaſts of prey, to be hunted down by the univerſal concurrence of mankind.

This

This offence, by the common law of England, was a ſpecies of Treaſon, except when committed by aliens; but puniſhable only as ſuch, when the act, if committed on land, would have amounted to a capital crime. The ſtatute of treaſons left it a Capital felony only. The deſcriptions of it have been much extended by modern acts of parliament;[y] and it may be doubted, whether ſome offences are not deſcribed therein, and puniſhable as piracies, which have no connection with our ideas of that of offence. "Any commander or other ſeafaring perſon, betraying his truſt, and running away with any ſhip, boat, ordnance, ammunition, or goods, ſhall be adjudged a pirate: and the trading with pirates, or in any wiſe correſponding with them, and the forcibly boarding any merchant veſſel, tho' without ſeizing and carrying her off, and deſtroying or throwing any of the goods overboard", are all under theſe acts deemed proofs of Piracy.

This circumſtance reminds me of another modern ſtatute,[z] which infers the guilt of high-treaſon on all thoſe, who ſhall knowingly

[y] 11. and 12. Wm 3. ch. 7. and 8. Geo. 1. c. 24.

[z] 8 and 9 W. 3. c. 26. made perpetual by 7 Ann. c. 25.

make, or mend, or ſhall have in poſſeſſion any inſtrument *proper only* for the coinage of money.

The Laws of Henry the 8th were not more prepoſterous, when they gave the appellation of treaſon to the ſtealing of cattle by Welſhmen, to the deflow'ring of his Majeſty's Aunts, and Nieces, and to the bare ſolicitation of the chaſtity of his Daughter; nor the ancient law of Edmund, which made mere Fornication with a Nun puniſhable as homicide.[b]

The miſapplication of terms in the framing of penal laws is dangerous to liberty.

CHAP. XIV.

Of Treaſons.

§. 1. MAJESTY hath no prerogative againſt the arm of fate. But the perſonal protection of Majeſty againſt the efforts of diſloyalty is within the province

[b] Auxi je trouva inter les leis de St. Edmond quondam roy deins ceſt realme, ceſt ley. "Qui cum nunna vel ſanctimoniali fornicetur, emendetur ſicut homicida.

of

of human foreſight; and ſhould be within the firſt ſanctions of poſitive law.

Many are the ſleepleſs hours, which the Sovereign muſt undergo; infinite is the heart-eaſe, which he muſt neglect, for the ſake of his ſubjects. His preſervation becomes in return the primary object of their care; and thus it is, that the reciprocal duties of protection and allegiance form the foundation, and ſupport of the political union.—Juſtice watches like a guardian angel, over the reſtleſs pillow of her defender; for every blow, levelled at him, is, in its conſequences, levelled at the whole civil eſtabliſhment.—The general welfare of the people is blended in the ſafety of their common father, and repreſentative; nor can his life fall a ſacrifice to conſpiracy or faction, without involving the whole realm in popular inveteracies, blood, and deſolation.

Hence it follows, that high treaſon, which, in every inſtance, ſtrikes ultimately at the well-being of ſovereignty, is the fouleſt crime that can be committed; becauſe it is of all crimes the moſt audacious in its nature, and the moſt extenſively pernicious in its conſequences. But the fouleſt inſtance of this crime is that, which aims

aims directly at the royal perſon; becauſe it is the moſt fatal and moſt entire renunciation, of faith, duty, ſubjection, and allegiance.

The peculiar jealouſy of mankind on this point is ſuch, that, in every known ſyſtem of laws, the mere imagination of the traitor, when evidenced by any external action, is ranked in the ſame degree of guilt, and ſubjected to the ſame degree of puniſhment, as the actual completion of the Treaſon; not becauſe the idea is deemed equivalent to the perpetration of the fact; but becauſe the ſevereſt chaſtiſement, within the poſſible diſpenſation of the law-giver, is thought due to the malignity of the intent.—"*Eadem ſeveritate voluntatem hujus ſceleris, qua effectum puniri jura voluerunt*:"[c] Such were the words of the Roman Law, which did not ſuffer the crime of high treaſon to be extinguiſhed even by the death of the criminal;[d] but with an unjuſ-

[c] Cod. ad leg. Jul. L. 9. t. 8. l. 5.

[d] Extinguitur crimen mortalitate, niſi forte quis majeſtatis ſit reus: nam hoc crimine, niſi ſucceſſoribus vindicetur, Hereditas fiſco vindicatur.

Ff. ad Leg. Jul. Maj. L. 11.

Nam ex eo tempore quo aliquis hanc cogitationem ſubiit, propter cogitationem dignus eſt poena. Cod. ad L J. 6.

In England a perſon ſlain in open undoubted rebellion is not liable to any forfeiture; for the benevolence of our law always

tifiable ſingularity extended the proſecution to his corpſe, and the forfeitures to his repreſentatives and heirs.

The old laws of the Lombards puniſhed as a Traitor "any Man, who ſhould conceive a thought againſt the ſoul of the King:" the ſame Laws[e] puniſhed the marriage of any woman, that had taken a religious habit, "every ſuch woman being precontracted *as the ſpouſe* of God." The pruriency of a figurative imagination ought not to be indulged in the compoſition of penal laws; poetical licenſe in the deſcription of crimes leads to ſanguinary conſequences.

The laſt obſervation is in ſome degree applicable to the ſtatute of Edward the third,

always preſumes the poſſibility of a defence known only to the criminal; and on the ſame principle, if even after conviction and judgment the offender becomes inſane, his execution ſhall be ſtayed; for, were he of ſound mind, he might perhaps alledge ſomething in ſtay of the proceeding. The 33d of Henry the 8th ch. 20. directed in caſes of treaſon, the Lunatic to be tried and executed, "*his lunacy and madneſs notwithſtanding*:" but this act was repealed: there is good ſenſe on this point in the grand Couſtumier. "Si aliquis extra mentem conſtitutam ſuâ dementiâ aliquem aut interfecerit aut mehaigmaverit, perpetuo carceri eſt mancipandum. fol. 13.

[e] Siquis contra animam regis cogitaverit.

[f] Book 2nd Tit. 57.

which

which is at this day the ſtandard meaſure to the people of their duty to the Sovereign. The firſt clauſe of that ſtatute is in the following words, "When a man doth compaſs or imagine the death of our Lord the King, of Madam, his Companion (conſort), or of their eldeſt ſon and heir". This was declaratory of the Common Law of the realm, which might have been copied with better preciſion from the words of Bracton.[f] *Si quis auſu temerario machinatus ſit in mortem domini regis*". The word "compaſſeth" in the ſtatute was probably borrowed from Britton,[g] or from the editor of the Myrrour, who wrote in the time of Edward the 1ſt, about forty years after Bracton. The other word "imagineth" ſeems firſt to have inadvertently received this harſh application from the Parliament of Edward the third; but it was not the temper of that excellent parliament, to leave

[g] L. 3. c. 2.

[h] Grand treſon eſt de compaſſer notre mort. Brit. ca. 8. Peche de Majeſty eſt vers le Roy de la terre en trois maniere. 1. per ceux que occident le roy ou compaſſent de faire. 2. per ceux que luy deſheritent del royalme per trahiſſent un hoſt, ou compaſſent de le faire. 3. per ceux avowterors que ſpargiſſent le femme le roy, le file le roy eigneſſe, legittime, avant ceo que elle ſoit Mary, en la garde le roy; ou la Neece le etant le heire le roy. Myrror. ca. 1. §. 4.

It ſhould be obſerved, that, in this account of the ſeveral ſpecies of treaſon, coining is not mentioned.

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the conſtruction of ſuch words vague, and indeterminate; and it accordingly required, that " the criminal ſhould be attainted, *upon full proof* [h] *of an open deed, by people of his own condition*".

It is then, and it ever hath been, the law of England, to puniſh a mere intention to kill the king, more ſeverely than the actual and moſt wilful murder of a private ſubject; but the guilt commences only, when *ſome meaſure* [m] ſhall appear to have been taken to effectuate the guilty purpoſe. A mere concealment of a traiterous confederacy will not with us, as among the Romans, [n] amount to treaſon. There muſt be alledged, and proved, ſome act declaratory of the intention, ſome poſitive participa-

[h] " *Provablement*" this word is by the editors of the ſtatutes inadvertently rendered " *probably*," notwithſtanding the caution of Sir Edw. Coke. " The adverb *provably* (ſaith he) " hath a great force, and ſignifieth a direct and plain proof: " which word the King, Lords, and Commons did uſe for " that the Offence was ſo heinous, and was ſo heavily and " ſeverely puniſhed, as none other the like. Note the word " is not probably, for then commune argumentum might " have ſerved." 3 Inſt. 12.

[m] Foſter, pa. 195. 1 Hales hiſt. P.C. 119. Keil 17.

[n] Id quod de prædictis reis majeſtatis, etiam de ſatellitibus, *conſciis*, ac miniſtris eorum eâdem ſeveritate dicimus. L. 6. Cod. ad Leg. Jul. Even the wife on this point was obliged to betray her huſband. Nov. 117. c. 8.

tion

tion in the guilt, ſome conſultation, perſuaſion, or means of incitement. Advice given in a treaſon merely inchoate, and never executed, will make the adviſer a principal in the treaſon. A ſending of letters, or a preparation of weapons, or poiſon, in contemplation of the crime; treaſonable printing or writing with publication; or unpubliſhed writings, if relative to the practices charged in the indictment; words explanatory of an act, or ſpoken *in proſecution*[o] of a traiterous purpoſe; theſe are all matters of proper, and competent evidence, to be offered in proof. But the open deed, to be ſhewn at the trial, muſt be ſpecifically, and correctly charged in the indictment; that the perſon accuſed may be prepared to refute, explain, or defend it. And an open deed, not ſo charged, cannot be given in evidence, unleſs it conduce to prove one that is[p] ſo. This rule, in caſes of treaſon, is founded on a poſitive proviſion; but it hath ever been the wiſe and equitable practice of our courts, in other criminal proſecutions, to reject all manner of evidence, unconnected with the point in iſſue. A multiplicity of diſtinct and independent facts, however tending

[o] Foſter, pa. 200. [p] State Tryals, 5. pa. 22.

to

to the ſame inference, might inſenſibly confound the attention of the perſon accuſed, baffle the plan of his defence, and influence the diſpoſition of his judges.

But there are other open deeds of a more explicit kind, which come within the idea of compaſſing the King's death, though in themſelves (and under expreſs ſtatutes ſo deſcribed) diſtinct ſpecies of treaſon, and liable, as ſuch, to be charged and proved. Thus, levying of war; and, under certain limitations,[q] conſpiring to levy war; concerting with foreigners and others in order to an invaſion of the kingdom;[r] entering into meaſures for depoſing the Sovereign; may always, and in ſome caſes muſt,[s] be charged, as overt acts of compaſſing. Again, the actual murder of the King operates in legal evidence, only as an overt act to prove the compaſſing of his

[q] Foſter, pa. 213.

[r] This was the caſe of Cardinal Pole, who was ſaid to have written a book for that purpoſe to the Emperor Charles. Co. P. C. pa. 19.

[s] For example, a combination with foreigners in amity with the kingdom, cannot poſſibly be brought within any other clauſe of the ſtatute; nor will a mere conſpiracy to levy war amount to treaſon, unleſs particularly pointed againſt the perſon of the King, or *his* government.

To

death.[t] To the ſame purpoſe may be ſhewn an overt act of conſpiracy to impriſon the King, or to reſtrain his perſon by force. Here the law preſumes, that when reſpect is ſo far forgotten, the more ſacred duties of allegiance will ſoon be obliterated in blood; and hiſtory proves, that priſons are generally the ſlaughter houſes of Princes. The inſtance of a Monarch, conducted to the ſcaffold after all the ſolemnity of a tryal and judgment, in the open day, in the preſence of his people, with all the apparatus, and formalities of a penal execution, is without a parallel.

§. 2. The ſecond ſpecies of treaſon in this ſtatute is, "*when a man doth violate the King's* "*conſort, or his eldeſt daughter unmarried*; *or* "*the wife of his eldeſt ſon and heir.*" Violation[u] here implies a carnal knowledge by whatever means obtained, and is made a treaſonable act for very ſolid, ſatisfactory, and evident reaſons. There are certainly inaccuracies[w] in

[t] Kelyng, pa. 8. The caſe of the regicides. 1 Hawk. 34.

[u] This offence committed by a tenant with the wife of his lord, was in the feudal law ſubjected to a forfeiture. "Si vaſallus fecerit feloniam dominum ſorte cucurbitando." Feud. l. 2. t. 38. Brit. l. 1. c. 22.

[w] Hale's hiſt. P. C. 1. 129.

the

the wording of the clauſe; but perhaps they are immaterial. The wife of the ſecond ſon is not within the ſtatute, though her iſſue is inheritable, in preference to the eldeſt daughter; neither doth it ſeem treaſon to violate the eldeſt daughter, that hath been married, ſuch violation not being within the letter of the ſtatute, though within the reaſon. The common law extended the ſame ſanction to *all* the daughters.

In the conſtruction of the laſt-mentioned clauſe, it hath been the unanimous inference of all the writers on the Engliſh law,[x] that "if both the parties be conſenting, they are "equally guilty of treaſon;" conſequently, that a queen conſort committing adultery committeth treaſon; and the caſes of Q. Anne

[x] Co. Inſt. 3. 2. Hales hiſt. P. C. 1. 124. Commentaries 4. 81.

This idea, which certainly is not warranted by the words "*if a man doth violate, &c.* ſeems to have ariſen from the manuſcript report of Judge Spelman "of matters relative to the "trial of Anne Boleyne" which, I believe, is now loſt. Sir E. Coke profeſſedly founds his opinion thereon; and Biſhop Burnet, who wrote his account from Spelman, obſerves, that "there would have been no need of ſtretching the other "ſtatute, if they could have proved the violating the Queen, "*for then* the known ſtatute 25 Ed. 3 would have been "ſufficient."

Boleyne, and of Catherine Howard, are referred to, as the grounds of this opinion.

I ſubmit with great diffidence, that a different concluſion ought to have reſulted from each of thoſe caſes. Anne Boleyne's judges would very chearfully have given the appellation of burglary, piracy, or horſe-ſtealing, to the crime of which ſhe was accuſed; but, in fact, ſhe was executed under the ſtrained conſtruction of an inadvertent expreſſion.[y] She was proved to have ſaid to her ſervants, "that "the King never had her heart," which was charged to be ſlanderous to the iſſue begotten between the King and her. She was convicted therefore on a ſtatute made two years before, declaring it treaſon to throw ſlander on the King, Queen, or their iſſue. "So that, "ſaith Biſhop Burnet, the law that was made "for her, and the iſſue of her marriage, was "now made uſe of for to deſtroy her."[z] An

[y] 25 H. 8. ca. 22. §. 8. Biſhop Burnet, vol. 1. p. 202. And Hume's hiſt. vol. 3. pa. 207. Stow. 557. Hall 227.

[z] In her, ſaith Lord Herbert, were eminent the moſt attractive perfections. Beauty indeed is not always the beſt keeper of itſelf; yet ſhe was thought both moderate in her deſires, and of diſcretion enough, to make her capable of being truſted with her own perfections. I do reject all thoſe therefore that would ſpeak againſt her honour, in thoſe times they

act of parliament was ſoon afterwards made to declare her marriage to have been unlawful, "for that his Highneſs had choſen to wife the "virtuous and excellent Lady Jane; who "for her convenient years, excellent beautye, "and pureneſſe of fleſshe and bloude, would "be apt, God willinge, to conceive iſſue by "his highneſſe." As to Catherine Howard, ſhe was beheaded under an expreſs ſtatute of attainder,[a] upon petition of both houſes of parliament to the King, "that he would not "vex himſelf, but give his royal aſſent to "what they ſhould do." Her grandmother the Ducheſs of Norfolk, with twelve perſons more, was at the ſame time attainted of miſpriſion, for having concealed her vicious life,

they ſtaid in France; but I ſhall as little accuſe her in this particular of her affairs in this time; it is enough that the law hath condemned her. "No cauſe hereof is re-"lated yet, unleſs that at a tournament ſhe let fall a "handkerchief, wherewith ſome one, ſuppoſed to be her "favourite, wiped his face; and that this was perceived by "the King. But ſuſpicion in great minds is like a tempeſt, "which, though it ſcarce ſtir low, and ſhallow waters, "when it meets with a ſea, both vexes it, and makes it toſs "all that come thereon. The Archbiſhop of Canterbury, "in a conſolatory letter to the King, wrote as much in her "behalf as he durſt. The King ſolemnized his intended "marriage three days after her death, *not thinking it fit to "mourn long for one the law had declared criminal.*" Hiſt. of Hen. 7. p. 285, & 440.

[a] Stat. 33. H. 8. c. 21. Herbert, p. 538.

which they were ſuppoſed to have known previous to her marriage. The ſame act required[b] all, who hereafter ſhould know, or vehemently preſume, any condition of lightneſs of body in her which ſhould be Queen, to diſcloſe it to the King, or Council; "prohibiting every "one at the ſame time to blow it abroad, or "whiſper it to others."

The ingenuity of this parliament went further; for they not only made it treaſon in the Queen to have committed an act of incontinency, prior to the marriage, without previouſly revealing it; but they extended the ſame guilt to all concealers of that incontinency; and alſo[c] made it treaſon in the Queen to make advances of gallantry after marriage, by writing, words, tokens, or otherwiſe, tho' not followed by any effect.

It was agreeable to the mercileſs fertility of Henry's genius, to draw torrents of blood

[b] But not under the pains of high treaſon, as miſconceived by Mr. Hume, vol. 3. p. 248; or under any other penalty: the clauſe was merely a permiſſive protection to the informer, againſt the words of the ſtatute, under which Anne Boleyne had ſuffered.

[c] All theſe proviſions are in the ſame ſtatute; the enactors cannot be preſumed to have retained any remains of ſhame; yet it is obſervable, that it was not entered on the roll.

from

from the influences of natural affection, the ties of confidence, and the ſentiments of ſhame and decency.

The paſſive pliability of parliaments in this age was wonderful. Henry was hardly cold in his grave, when the Protector, Somerſet, in order to win the *arbitrium popularis auræ*, obtained the repealing ſtat. 1 Edw. 6. c. 12. which recites in the preamble, "that it had "been neceſſary in the time of the late King "to make many laws, which might appear to "men of exteriour realms, and to many of his "Majeſty's ſubjects, very ſtrait, ſore, extreme "and terrible; though they had not been "without great conſideration, and policy, "moved and eſtabliſhed. But, as in tempeſt, "or winter, one courſe and garment is con-"venient, in calm or warm weather a more "liberal caſe, or lighter garment, ſo, &c."

In like manner the 1 Mary, ch. 1. recites, that *many laws had been made*; *by which even learned and expert people, minding honeſty, are oftentimes trapped and ſnared*, therefore, &c.

Thus all theſe forced, and ſtrange effects of Henry's invention were abrogated by the

firſt acts of his children; and the doctrine of treaſons was once more reduced to the ſtandard of the 25 Edw. 3.

§. 3. The next treaſon, mentioned in that ſtatute, is of a more outrageous nature, and tending more immediately to break all the bands of government; I mean "the levying "of war againſt the King in his realm." Under this deſcription, a mere conſpiracy to levy war, unleſs directly againſt the King, is not treaſon; but in a conſpiracy for more remote purpoſes, if war be actually levied by ſome of the conſpirators, they are all conſidered as principal traitors.

The words of the ſtatute ſeem to imply a military aſſemblage, or armed inſurrection; not upon a private quarrel between powerful individuals; not in maintenance of a perſonal claim, or in purſuit of a particular redreſs; but ſuch a riſing, as may, in judgment of law, be intended againſt the perſon of the king, to ſeize, dethrone, or impriſon him; or to oblige him *by violence*, to alter the meaſures of his government; or to compel a change in the religion ſettled by Law; or to withhold caſtles or fortreſſes by weapons offenſive and invaſive,

vaſive; or, laſtly, a wilful joining with open rebels, in which caſe force is no excuſe, unleſs applied immediately againſt the perſon, or exciting inſtant fear of death. For if the fear of having houſes burnt, or goods ſpoiled, were a ſufficient plea, it might be in the power of any leader to indemnify all his followers.[d]

It is not for private ſubjects, miſguided perhaps by ignorance, and heated by faction, to determine the proper moment of reſiſtance againſt ſuppoſed violations of fundamental laws, ſubverſions of the conſtitution, and breaches of the original contract:

For never yet did Inſurrection want
Such water-colours to impaint her cauſe,
Nor moody beggars ſtarving for a time
Of pell-mell havock and confuſion.[e]

The infatuated miſconduct of princes may certainly induce a criſis, in which the riſing of the nation, as one man, is not only juſtifiable, but laudable, and glorious; but ſuch a criſis is to be decided by the united voice of the Society at large, not by the partial diſſonance of clamorous Individuals. One may admire the

[d] Macgrowther's caſe. State Trials, 8. p. 56.
[e] Shakeſpeare.

courage, but it would be difficult to juſtify the conduct, of Flavius the Tribune, ſo finely recorded by Tacitus;[e] *Dein poſtquam urgebatur, confeſſionis gloriam amplexus, interrogatuſque de Nerone, quibus cauſis ad oblivionem ſacramenti proceſſiſſet:* "*Oderam te, inquit;* "*nec quiſquam tibi fidelior militum fuit, dum* "*amari meruiſti. Odiſſe coepi, poſtquam parri-*"*cida matris et uxoris, auriga, et hiſtrio, et* "*incendiarius, exitiſti.*" Had the attempt of Flavius ſucceeded, he would have deſerved to be treated as a traiterous aſſaſſin. For though the character of Nero was undoubtedly moſt deteſtable; yet the perſon of the prince is in no caſe liable to the chaſtiſement of a ſubject. Dreadful indeed would be the condition of Sovereignty, if a contrary doctrine were tolerated.

It ſeems, on the whole, to have been the ſole object of this clauſe, to ſuppreſs, and puniſh the daring efforts of *poſitive rebellion* againſt the adminiſtration of government, or the perſon of majeſty; and this deſcription might, in ſtrictneſs, be thought to comprize every poſſible caſe, within this ſpecies of treaſon. But the idea hath, in the courſe of

[e] Tacit. Annal. l. 15. c. 67.

years,

years, been extended with great liberality of interpretation.

A riſing with intention to kill one of the privy council;[g] a tumultuary combination[h] to compel the king to put away his miniſters; an armed force with a *general purport* to deſtroy incloſures, to deliver priſons,[i] or to demoliſh bawdy houſes,[k] or pull down meeting houſes of diſſenters; (in which caſes the univerſality of the deſign is conſtrued into rebellion) laſtly, inſurrections to effect redreſs or innovation of public and general concern, in which the inſurgents have no ſpecial intereſt;[l] or forcibly to render ineffectual any act of parliament, or law of the realm; all theſe are adjudged to be levying war within the ſtatute.

The recital of this very general head of conſtruction will naturally bring to the reader's recollection one of the articles of the mutiny act; which receives the annual ſanction of parliament, and makes the diſobedience of legal orders puniſhable by death. *Such precarious, indefineable claſſes of crimes, have a ne-*

[g] Talbot's caſe. 17. R. 2nd. [h] Earl of Eſſex's caſe.
[i] Old Bailey Trials, 1688. [k] Hale's Hiſt. P. C. 1. 134.
[l] Foſter, 213.

ceſſary

ceſſary tendency to deſtroy the confidence of the ſubject, and to give an arbitrary power to the Judge.

As to the other enormities abovementioned, the conſtitution hath certainly intruſted the firſt, and proper exertion for the redreſs of grievances to the high court of parliament; yet to the eye of humanity it will appear doubtful, whether certain offences have not occaſionally received the hard denomination of rebellion, which might more properly have been puniſhed as treſpaſſes, miſdemeanors, and riots.

It is by no means the temper of modern Judges to encourage arguments of implication to the extenſion of penal laws; I ſhall tranſcribe the concurring ſentiment of the learned, and benevolent Sir M. Hale, with particular regret in this inſtance, that his manuſcript[n] remained ſo long unpubliſhed.

" We muſt acquieſce in reſolutions when " made and ſettled: but in my opinion, if " new caſes happen for the future, *that have* " *not an expreſs reſolution in point, nor are ex-*

[n] Hiſt. P. C.

" *preſsly*

" *preſſly within the words of the 25th E. 3d,* " though they may ſeem to have a parity of " reaſon, it is the ſafeſt way, and moſt agree- " able to the wiſdom of that great act, firſt to " conſult the parliament, and have their de- " claration; and to be very wary in multiply- " ing conſtructive, and interpretative treaſons, " *for we know not where it may end.*"

§. 4. The ſtatute proceeds to deſcribe that fourth ſpecies of treaſon, which conſiſts in " adherence to the kings enemies." The deſcription of this offence had been in the ſame words near 200 years before, whenever any Norman quitted for France the allegiance due to England; and the ſtyle of forfeitures under King John was, " quia adhæſit inimicis noſtris in Normannia."

By " enemies" are meant " all aliens in notorious hoſtility." The ſolemnity of a previous denunciation of war is not always neceſſary,[a] as in the inſtance of general letters of marque and repriſals; and ſometimes it is impoſſible, as in the emergency of a ſudden Invaſion. Whether the perſons adhered to were enemies, is a matter of fact pro-

[a] Bynkerſhock quæſt. juris publici pa. 1. et ſeq.

per

per to be averred, and evidenced by its public notoriety.

Furniſhing money, arms, ammunition, and proviſions, or ſending intelligence, are all in reaſon, and conſequently in law, acts of adherence; even though they ſhould be intercepted in their paſſage;[o] for the treaſon, though ineffective, is complete on the part of the traitor.

A ſubject of the enemy-country, continuing under the protection of England, and practiſing, whilſt in England, to the aid and aſſiſtance of that enemy-country, comes under the words of the ſtatute; but mere reſidence in a hoſtile kingdom is not in itſelf an adherence, though a refuſal to return to the mother country upon proclamation may be evidence thereof.

Other acts of adherence are, actual war againſt the king's allies; the treacherous ſurrendering, in colluſion with the enemy, of a place of defence; a voluntary oath of fealty to the enemy king; or cruiſing under his commiſſion, though without any abſolute act of hoſtility.[p]

[o] Gregg's caſe, A. D. 1707—See Burnet's memoirs—and Dr. Henſy's caſe in B. R. 31. Geo. 2.—Foſter 218.

[p] St. Tr. 5. p. 22.—8. W. 3. Trial of Capt. Vaughan, who was executed for this offence.

§. 5. To

§. 5. To a ſpeculative mind, unbiaſſed by the habitual warpings of poſitive law, I may now appear to have conſidered all the treaſons, which can exiſt, as mediately, or immediately relative to the perſon of Majeſty, and the ſafety of the realm. But, diſguſting as the taſk is, there is no avoiding the mention of a great variety of other delinquencies, which, by the ſtatute of Edward the third, and by ſubſequent acts of parliament, have been branded with the hard denomination and heavy penalties of high-treaſon.

It was conſiſtent with the ſcholaſtic ſubtlety of ſome, and the credulity of others of our anceſtors, to argue and to believe, that a miſ-application of the royal prerogative by a ſubject amounted in guilt to an uſurpation of ſovereignty; and that an abuſe of the king's image, though merely with a view to private gain, ought to be conſidered as the moſt traiterous diſaffection to the perſon of Majeſty.[q]

[q] The extravagance of this idea among the Romans was ſuch, that Severus, and Antoninus, found it neceſſary by Reſcript to declare, that if a Perſon in throwing a ſtone ſhould by chance ſtrike one of the Emperor's Statues, he ſhould not, on that account, be liable to proſecution for Treaſon. Ff. L. 5. ad Leg. Jul.

On

On theſe principles the ſtatute proceeded to make it treaſon "to counterfeit the king's great or privy ſeal; or the king's money; or to bring counterfeit money into the realm, knowing it to be falſe." Nor doth this proviſion appear to have lain dormant; for we find frequent mention of its effects in the writers of that age, and on one occaſion [r] in the ſubſequent reign before Belknap, Skipwith, and others, apud Lincoln; *Septem falſarii monetæ tracti fuerunt, et ſuſpenſi; et quidam Vicarius de Wintringham obmuteſcens adjudicatus erat ad pœnam Mutorum.*

But ſtill the offences of clipping, filing, lightening, and impairing, were not expreſſly deſcribed; yet they were found equally pernicious to trade, and equally affronts to the image of ſovereignty, though not ſuch immediate uſurpations of its attributes. *To ſettle the doubt therefore, and not merely as a new law,*[s] all ſuch diminutions were declared to be high-treaſon. And indeed clipping ſeems to

[r] Knyghton's Hiſt. A. D. 1389.

[s] 3. H. 5. c. 6. which ſtatute hath not been remarked by modern writers, who date the penalty of treaſon for the offence of impairing the coin from ſtat. 5. Eliz. 8.—The Anſwer on the rolls given by Henry the fifth is, "quant a le loture, tonſure, et fillage, ſoit il declare pur treſon."

have

have been a crime of a very ſerious nature, prior even to the ſtatute of treaſons; for we find the following remark,[t] ſo early as the year 1278, "*Judæi pro tonſurâ monetæ in magnâ multitudine ubique per Angliam ſuſpenduntur.*"

This, with other intermediate treaſons, was repealed, and revived alternately, during a long courſe of years. At preſent, by the aid of many modern ſtatutes, in which the accuracy and ingenuity of deſcription ſeem to have engaged all the anxiety of the enactors, it forms a very conſiderable article in our laws; and frequently puzzles all the efforts of mercy to ſave the wretches, who become liable to its penalties.

It is now high-treaſon, to have in poſſeſſion any inſtrument, or tool, "not of common uſe in any trade," but proper only for Coining.[t] With equal propriety might it be called homicide to be in poſſeſſion of a Piſtol.

It is the ſame crime, "to make, or mend, or have in poſſeſſion, any inſtrument, or cut-

[t] 8. and 9. W. 3. c. 26.

ting

ting engine, for cutting round blanks, by force of a ſcrew, out of flatted bars of gold, ſilver, or other metal:" I have copied the words of the ſtatute. It may be proper to obſerve here, that there are many inferior offences, relative to the coin, in the nature of felonies and miſdemeanors; and it is much to be regretted, that the ſeveral ſtatutes on this ſubject are not all reduced into one act.

I ſhall only add, that, by the laſt act on this ſubject,[a] "*the alteration of a farthing with intention to make it paſs for a ſixpence, is high-treaſon in the offender, his aiders, and abettors.*"

The idea of, what Bodin affectedly calls, the harmonious proportion of puniſhments, ſhould never be forgotten in acts of penal legiſlation. It is mercileſs and abſurd, to impute the ſame guilt, and give the ſame chaſtiſement, to the leader of a rebellion, and the diminiſher of a piece of money.

This extravagant idea ſeems to have exiſted in the common law of England; and probably derived its origin from the law of the

[a] 16. Geo. 2.

Romans.

Romans. " *Cudendæ pecuniæ obnoxii Majeſta-*
" *tis crimen admittunt, et omni dilatione remotâ*
" *Flammarum exuſtionibus* [w] *mancipentur:*" and again, " *Quicunque nummos aureos partim*
" *tinxerint, partim finxerint, vel raſerint, ſi*
" *quidem liberi ſunt, ad beſtias dari; ſi ſervi,*
" *ſummo ſupplicio affici debent.*" Such were the expreſſions of Theodoſius and Juſtinian; but no earthly authority can juſtify the conſequences of their import, which will be beſt deſcribed in the words of an eloquent and humane modern writer. " This confounds
" the diſtinction and proportion of offences;
" and by affixing the ſame ideas of guilt upon
" the man who coins a leaden groat, and him
" who aſſaſſinates his ſovereign, takes off from
" that horror, which ought to attend the very
" mention of the crime of high-treaſon, and
" makes it familiar to the ſubject."

In France alſo this crime is conſidered as a ſpecies of treaſon, and ſubjected to Capital puniſhment by an edict, A. D. 1726; it was formerly treated with greater mildneſs, as we learn by the following law promulgated by Childebert 3d, A. D, 744; [x] *de fulſâ monetâ*

[w] Cod. 9. 24. 2.

[x] Baluze, T. 1. ca. 20. pa. 154.

jubemus, ut qui eam percuſſiſſe comprobatus fuerit, manus ei amputetur; et qui hoc conſenſit, ſi liber eſt, ſexaginta ſolidos componat; ſi ſervus, ſexaginta ictus accipiat.

§. 6. The laſt kind of treaſon, declared in this ſtatute, relates to the actual killing of certain magiſtrates in the execution of their offices. Reverence and ſecurity, are certainly due to the diſpenſers of public juſtice; but it may be doubted, whether they are ſo immediately the repreſentatives of ſovereignty, as to make the crime, however aggravated in its nature, loſe its proper name of murder.

§. 7. All the treaſons created between this ſtatute, and the firſt of Mary, were repealed in the commencement of her reign; together with all felonies, and præmunires enacted under Henry the 8th.

But the ſtruggles and jealouſies, attending the firſt progreſs of the reformation, introduced a new ſpecies of treaſons; of which, after various alterations, the following exiſt at this day.

Firſt,

Firſt, The ſecond offence of extolling the Pope's power;[y] upon which it is obvious to obſerve, that the idea of a treaſon, ariſing from a repetition of the offence, is in itſelf an abſurdity. It is alſo treaſon, to put in uſe, within the Queen's dominions, a Popiſh Bull of abſolution, or reconciliation;[z] or to withdraw, or be willingly withdrawn to the Popiſh religion; or to receive Popiſh orders; or to refuſe a ſecond tender of the oath. I have already obſerved, how repugnant it is to reaſon, religion, and humanity, to extend the infliction of death to the irreſiſtible dictates of conſcience, and belief.

§. 8. It will be ſufficient to refer to our ſtatute books for the particulars of another modern ſpecies of high-treaſon, the poſſibility of which ſeems ſoon likely to expire; and the neceſſity of which, as a civil ſanction, is already ſunk, in the united and affectionate attachment of the whole realm to the illuſtrious family of its preſent Sovereign. But the miſdirected, and dangerous zeal of political enthuſiaſts, made it expedient, in the eſtabliſhment of the proteſtant ſucceſſion, to affix the

[y] 5. Eliz. ſt. 2. Sav. 46. [z] 13. Eliz. c. 2.

higheſt civil guilt to every overt act, by writing, or otherwiſe, in oppoſition to that eſtabliſhment; to every denial of the power of parliament to limit the ſucceſſion; and to every mode of correſpondence with the abdicated prince, or his children.

To theſe wiſe ſeverities of our anceſtors we are in ſome degree indebted for the inheritance of thoſe rights, of which we boaſt the preſent enjoyment. The imitation of their venerable example, in the unimpaired tranſmiſſion of thoſe rights to our poſterity, is a duty, to which we are called by the united force of civil, and religious liberty.

§. 9. Having now, upon the principles of juſtice and neceſſity, examined the crime of high-treaſon, both as actually conſidered by the poſitive laws of different countries, and as it ought to have been conſidered by thoſe laws; I ſhall endeavour to purſue the ſame method as to the degrees of puniſhment, which have been, and which ought to be adapted to it.

Here we have a melancholy inſtance, how much the recollection of humanity may be inſenſibly

inſenſibly ſtifled in the warmth and reſentments of ſelf love. The crime, being perſonally and immediately againſt lawgivers and legiſlation, hath engaged the full exertion of ingenuity and power, to make its puniſhment as immoderate, and as complicated as poſible.

It would be a painful taſk, to deſcribe the executions of Ravaillac, and of Damiens; neither is it neceſſary to refer to the executive juſtice of foreign nations. I ſhall confine myſelf on this point to the practice of England, which cannot be ſtated better, than by an extract from the authoritative, and nervous deſcription of Sir Edward Coke; who with great profuſion of learning, and a total want of common benevolence, enters into the following diſcuſſion in the preſence and hearing of ſeven unhappy men, who were about to undergo this ſentence full of horrors.[a]

" Theſe traitors have exceeded all others " their predeceſſors in miſchief; yet his ma- " jeſty in his admirable clemency and mode- " ration will not invent any new tortures or " torments for them; but hath been graci-

[a] State Tryals 1. 235.

" ouſly pleaſed to afford them as well an
" ordinany courſe of trial, as an ordinary
" puniſhment much inferior to their offence.
" And ſurely worthy of obſervation is the
" treatment by law provided and appointed
" for high-treaſon.

" For firſt, the traitor ſhall be drawn to
" the place of execution, as being not wor-
" thy any more to tread upon the face of the
" earth, whereof he was made; and with his
" head declining downwards, and as near the
" ground as may be, being thought unfit to
" take the benefit of the common air.

" He ſhall next be hanged up by the
" neck between heaven and earth, as deem-
" ed unworthy of both or either, as likewiſe
" that the eyes of men may behold, and their
" hearts contemn him. Then is he to be
" cut down alive, and to have his parts of
" generation cut off, and burnt before his
" face, as being unworthily begotten, and
" unfit to leave any race after him. His in-
" layed parts ſhall alſo be taken out, and
" burnt, for it was his heart, which har-
" boured ſuch horrible treaſon. His head
" ſhall be cut off, which imagined the miſ-
" chief; and laſtly, his body ſhall be quar-
tered,

" tered, and the quarters ſet up in ſome " high, and eminent place, to the view and " deteſtation of men, and to become a prey " for the fowls of the air. And this is the re- " ward due to traitors; for it is the phyſic of " government to let out corrupt blood."

It hath been affirmed both with reſpect to nations, and individuals, that the ſentiments of benevolence bear a general proportion to the progreſs of ſcience; but the name of Sir Edward Coke will not be cited in ſupport of this obſervation. With great acuteneſs and depth of learning, he retained through life a hard, unpitying nature; that brutal inſolence which is ſo often produced in narrow minds, by undeſerved or unexpected proſperity, marked all his actions. His learning indeed was not of that kind, which we call *literæ humaniores*; but it would be an inference, highly injurious to the profeſſion, to ſuppoſe, that the practice of law blunts the ſenſibility of the mind.

As to the puniſhment inflicted by our law on high-treaſon, which occaſioned this digreſſion; it appears formerly to have been a part

of the judgment,[b] that the convict ſhould be drawn upon a hurdle; but an inſtance is recorded,[c] in which Shard, Juſtice, ordered, that nothing ſhould be brought, whereupon he ſhould be drawn, "*mes que ſans cley, ou autre choſe a deſouth lui, ſoit tray de chivaux, hors de la ſale, ou il avoit judgment, tanque a les fures &c.* It was alſo a part of the ancient judgment,[d] *que les privies membres ſoient exciſes de ſon corps, et comburés deins ſon vieu:* but this was omitted by Lord Hardwick in the judgments paſſed upon the four Lords in the year 1746;[e] and in a former caſe had been thought unneceſſary.[f] Still however the criminal muſt be ordered to be cut down alive. For upon a writ[g] of error, to reverſe an attainder in the 8th of W. 3. it was aſſigned for error, that the court had only directed, "*quod interiora* "*ſua extra ventrem ſuum capiantur, et in ig-*"*nem ponantur,*" omitting, "*ipſo vivente,*"

[b] Staunford l. 3. c. 19. p. 182. It is remarkable however that before the time of Henry 7. there were hardly two judgments, of which the form was the ſame. See Carthew's Reports, p. 349. Walcot's caſe.

[c] Aſſ. 33. 7. Hale's Hiſt. P. C. 1. 382.

[d] Staunford, 3. 19. [e] State Trials, vol. 9.

[f] Lord Raymond, p. 1. [g] Walcot's caſe, 12. Mod. 95, 96.

"or

or, "*in conſpectu ejus*;" and it was ſaid by Lord Holt, that "though this omiſſion be for "the benefit of the party attainted, yet ſtill "it is error; *for the judgment in all capital* "*caſes is ſtated, and ſettled by the common law,* "*which no court can alter.*" The attainder was thereupon reverſed, and the reverſal was affirmed in parliament.[h]

It is certain, that the crime of high-treaſon is often of ſuch a tendency, as to require the *ultimum ſupplicium*, or in other words the extirpation of the criminal.

But when we are conſtrained to have recourſe to that fatal extremity, it ſhould always be obſerved, that, whatever exceeds ſimple death, is mere cruelty. Every ſtep beyond is a trace of ancient barbarity, tending only to diſtract the attention of the ſpectators, and to leſſen the ſolemnity of the example. There is no ſuch thing as vindictive juſtice; the idea is ſhocking. Public utility is the meaſure of human puniſhments; and that utility is proportionate to the efficacy of the example. But whenever the horror of the crime is loſt in ſym-

[h] Mich. 11 W. 3. Shower's Parl. Caſes, p. 127.

pathy

pathy with the ſuperfluous ſufferings of the criminal, the example loſes its efficacy, and the law its reverence.

A nation, familiarized and reconciled to the execution of the Engliſh ſentence in caſes of high-treaſon, would probably conſiſt of a puſilanimous and deſpicable people; cruelty and cowardice are inſeparable.

CHAP. XV.

Of the Engliſh Trials in Caſes of High-Treaſon.

§. 1. I Ought not to diſmiſs this ſubject, without remarking a very pleaſing part of Engliſh law relative to high-treaſon; as founded in humanity, animated by the ſpirit of freedom, and perfected by all the powers of limited wiſdom.

From the affectionate temper of the nation, great warmth hath been ſhewn againſt the crime of diſloyalty, both in the liberality of its conſtruction, and in the ſeverity of its puniſhment; but the whole attention of the legiſlature

legiſlature hath at the ſame time been exerted, to obviate all poſſibility of oppreſſion in the proſecution, and all defect of certainty in the proof. Infinitely various have been the amendments, refinements, and alterations to this purpoſe; and, upon the whole, the following cautionary proviſions have been thought ſufficient, and are at this day in force.

No perſon ſhall be proſecuted for high-treaſon, except on a charge of [i]aſſaſſination deſigned or attempted on the body of the King, unleſs he be indicted thereof within three years after the offence committed.

Nor ſhall any perſon be indicted, except upon the teſtimony of two lawful witneſſes, either both to the ſame overt act, or the one of them to one, and the other to another overt act of the ſame treaſon.[k]

And now, ſince the deceaſe of the late pretender, a copy of the indictment with a liſt of the witneſſes to be produced at the trial, and

[i] 7 W. 3. c. 3. §. 6.

[k] Ibid, §. 2. which clauſe is founded on 1 Edw. 6. and 5 Edw. 6. And 1, 2, Ph. & M.

of

of the jurors impanelled, with the profeſſions, and places of abode of the ſaid witneſſes, and jurors, ſhall be delivered to the perſon indicted, ten days before the trial;[1] and it ſeems, that this would be conſtrued excluſively of the day of delivery, and the day of arraignment.

Laſtly, the ſame proceſs is given to compel perſons to appear for the perſon accuſed, as is uſed to compel them to appear againſt him; and they ſhall be upon oath, which was not the uſage heretofore.

I ſhould have obſerved, that theſe privileges are not extended to certain offences concerning the papal ſupremacy; nor to thoſe againſt the coin; nor indeed to any treaſon, wherein the corruption of blood is ſaved by ſtatute.

The jurors muſt by the common law be of the ſame county, wherein the offence was committed. When the trial comes on, the priſoner is allowed to object peremptorily to thirty-five, on mere caprice, prejudice, or private knowledge of their character, or prepoſ-

[1] 7 Ann. c. 22. and 20 Geo. 2. c. 30.

ſeſſions;

ſeſſions; and to any indefinite number, upon the aſſignment of a legal objection to each.

In this, and in the whole courſe of the proſecution, he ſhall alſo be allowed to make his defence, as well in points of fact, as in legal queſtions, by Counſel learned in the law, not exceeding two in number, to be named by himſelf, and aſſigned by the court; and his Counſel ſhall have free acceſs to him at all ſeaſonable hours.

The trials of Sir William Friend, Sir William Parkyns, and others, on the aſſaſſination plot, came on after this proviſion had received the royal aſſent, but before the commencement of its operation.[m] "I intreat, ſaid the "laſt of theſe gentlemen, that I may have "the allowance of Counſel; I have no ſkill "in indictments; I do not underſtand theſe "matters, nor what advantages may be pro-"per for me to take. The new ſtatute "wants but one day. What is juſt and "reaſonable to-morrow, ſurely is juſt and "reaſonable to-day, and your Lordſhip may "indulge me in this caſe."

[m] State Trials.

Holt

Holt, Chief Juſtice, was too good a judge to ſuffer the ſtubborn principles of law to yield to the milder inferences of equity. "*We* "*cannot* (he replied) *alter the law, till law-*"*makers direct us; we muſt conform to the law,* "*as it is at preſent, not what it will be to-*"*morrow; we are upon our oaths ſo to do.*"

It is remarkable, that this indulgence is not yet allowed, except in points of mere legal diſquiſition, in any other capital crime; a deficiency, which hath given riſe to the very benevolent adage, "That the judge ſhall al-"ways be counſel for the priſoner." And indeed, the probity of the Engliſh judges, aſſiſted by their experience and humanity, would generally afford ample ſecurity to perſons accuſed, if counſel had not full permiſſion to be employed againſt them. This permiſſion, in good times, was never exerted without great diſcretion and tenderneſs; ſtill however it was not always ineffective in its conſequences. But ſurely it is contradictory to the firſt principles of juſtice, that a priſoner, labouring under the weight of a capital charge, weakned by long confinement, diſtracted by apprehenſions, though perhaps innocent, diſtreſſed by the tears of his family, checked by conſcious

conſcious ignorance, and diſconcerted by the awful novelty of his ſituation; that, in ſuch a ſtate of mind, a priſoner ſhould be ſingly expoſed to the united, and unlimited proſecution of learned men, habituated to public ſpeaking, and (in the words of a very ancient author) "ſkilled in the arts of forwarding, and de-"fending a cauſe by the rules of law, and "cuſtoms of the realm." The judge may be anxious to expoſe, and refute the prevarication of the witneſſes; but he is ignorant of the minute circumſtances of the fact in queſtion; he knows not the characters of the men, and cannot ſtop the trial to receive private inſtructions from the priſoner. The jurors are honeſt, and inclinable to mercy; his equals, and his neighbours; choſen in ſome meaſure by himſelf; and ſuperior to all ſuſpicion: but perhaps they are illiterate; at all events they are men; and therefore liable to be hurried away by the eloquence, and abilities of advocates.

[a] Gents ne ſchachent my comunement touts les exceptions que valent en reſponſe: ſont countors neceſſaires, que fachent les cauſes avancer et defendre; per les Rules del Ley, et les uſages del Realme.

Myrrour. ch. 3. de Exceptions.

Both

Both the Romans,* and Athenians, appear to have given full ſcope to the exertion of oratory in criminal caſes, both for and againſt the defendant. Among the Athenians indeed there was a law of Solon's, forbidding advocates to uſe either *exordia* or *perorations*; or to circumvent the paſſions of the judges by artifices, either of commiſeration or amplification. Yet we are told by Cicero, that, when Demoſthenes was expected to plead, the fame of his eloquence brought a general concourſe of ſtrangers to Athens from the moſt remote parts of Greece, as to the moſt celebrated ſpectacle in the world; and thoſe of his orations, which have reached our time, are undoubtedly powerful examples of that pathetic and perſonifying ſpecies of eloquence, which is calculated to intoxicate the imagination of an audience, and communicate the ſucceſſive emotions of anger, indignation, and pity.

* Non ſolum autem dicendo, ſed etiam faciendo quædam, lachrymas movemus: unde et producere ipſos, qui periclitentur, ſqualidos atque deformes, et Liberos eorum ac parentes inſtitutum; *& ab accuſatoribus oſtendi cruentum Gladium, et lecta e vulneribus oſſa*; et veſtes ſanguine perfuſas videmus, et vulnera reſolvi, ac verberata corpora nudari, quarum rerum ingens plerumque vis eſt, velut in rem præſentem animos hominum ducentium. Et populum Romanum egit in furorem prætexta Caii Cæſaris prolata in foro cruenta. Quinctil. 6. 1.

There

There is a very remarkable anecdote recorded by Athenæus,[p] relative to the trial of Phryne, the Athenian Courtezan. She was the ſame, from whom Apelles drew his picture of Venus riſing from the waves, and who ſerved alſo as a model for the famous ſtatue of Praxiteles; two circumſtances, not immaterial in ſupport of the following fact. "*Phrynæ cum in capi-*
"*tali noxâ patrocinaretur Hyperides, et jam*
"*manifeſtum eſſet calculis judicum condemnatum*
"*iri; in apertum eam produxit, et diſciſſis tu-*
"*niculis, pectoreque nudato, poſtremâ orationis*
"*parte, illius conſpectâ pulchritudine, ita pero-*
"*ravit, ut, tanquam miniſtram ſacerdotemque*
"*Veneris, judices* religione tacti, *et miſerecordiâ*
"*commoti, necandam minime cenſuerunt.*" To this ſudden ſenſibility of the Areopagites, one may fairly apply Quinctillian's obſervation, "*quod harum rerum ingens plerumque vis eſt,*
"*velut in rem præſentem animos hominum*
"*ducentium.*"

It is to the credit, and to the ſolid advantage of the Engliſh nation, that the pathos of ſpeech is baniſhed from the Bar. The paſſions ought not to be addreſſed in appeals to the reaſon. The unſubſtantial harmony of

[p] Athenæus l. 13.

declamation may be well adapted to the ears of an arbitrary tribunal; but the deciſions of Engliſh Judges are founded on the argumentative inferences of ſtrict ſtatutes, and recorded precedents. Our courts have furniſhed proofs indeed, that the ſtrains of ancient eloquence are neither inimitable, nor unattainable; but they are by no means the proper theatre for the exertion of that talent. Plain ſenſe, delivered in accurate expreſſion, with a warm and graceful articulation, is the true eloquence of law.

But to return to my inquiry, how far Counſel ought to be admitted, either for, or againſt the defendant, in criminal proſecutions. Upon the whole, perhaps it might be the beſt medium, in all caſes, to confine the diſcuſſion of the fact to the artleſs unguided tale of the witneſſes; with a full permiſſion to Counſel, on both ſides indifferently, to ſuggeſt, ſupport, or refute queſtions, or objections of law, and to undertake the management at large, when the iſſue turns not upon the general queſtion of "Guilty" or "not Guilty," but upon collateral facts.[q] It might be proper at the ſame time to declare, how far trivial miſ-

[q] Foſter pa. 232. Stra. 824.

takes,

takes, in matters of mere form, ſhould continue fatal to the whole proceſs; and whether any exceptions of counſel ſhould be heard or allowed,[r] but what tend in ſome degree to affect the merits of the caſe.

§. 2. The admiſſibility and ſufficiency of evidence in trials for high-treaſon is alſo ſubjected to very peculiar limitations.

No evidence can be received of any overt act, not charged in the indictment; except, as in ſupport only of one which is charged. Two witneſſes are requiſite to the conviction, in the ſame manner as to the indictment; and they ſhall in giving their evidence be confronted with the perſon accuſed, which is now indeed the practice in all caſes. If two diſtinct treaſons be charged, one witneſs to each ſhall not be two within the meaning of the ſtatute; but one witneſs is ſufficient to prove any fact, on which the criminality of the charge is ultimately and not immediately founded; I ſhall cite an inſtance.[s]

[r] Hale's Hiſt. P. C. 2. 193. Mr. Emlyn's note.

[s] 5. State Trials 38.

When, in the trial of Captain Vaughan for adhering to the King's enemies, it was neceſſary in the outſet to prove him a ſubject of England; it was objected by his counſel, that one witneſs only, had been called for that purpoſe; and the objection was over-ruled by Holt, Chief Juſtice, "for that is no *overt* "act, if there be one witneſs to prove that, "it is ſufficient." In like manner, writing, being a deliberate act, certainly may [t] under ſome circumſtances *with publication* be an overt act of treaſon; and when ſo laid in the indictment, muſt be proved by the teſtimony of two witneſſes. But the teſtimony of one is competent to prove writings, offered only as collateral evidence; and ſuch papers, though not of the hand-writing of the priſoner, may be read as evidence, if found in his cuſtody;[u] and papers under certain deſcriptions may be in the legal cuſtody of a perſon, though not actually found upon him.[w]

By ſtatute 7 Wm. 3. ch. 3. theſe ſeveral requiſites towards conviction can only be ſup-

[t] Foſter 198.—Caſe of Layer, State Trials 6. 321.

[u] State Trials 6. 281.

[w] Lord Preſton's Caſe 4. State Trials 431.

plied

plied by "the confeſſion of the party, made in open court, willingly and without violence."

The words "in open court" were not inſerted in the ſtatute of Edward 6, which contained the reſt of this proviſo; and confeſſions, taken out of court upon the examination of the party, had been holden ſufficient.[x] But now, it ſhould ſeem, that ſuch confeſſions, though proved by two witneſſes, cannot in any caſe operate to conviction; and that there muſt ſtill be two witneſſes to the treaſonable fact.

But another doubt hath ariſen, how far ſuch confeſſions can be admiſſible, even as collateral evidence; and it ſeems to be the better opinion,[y] "that a confeſſion out of court may "be proper to be ſubmitted to the jury, in "corroboration of the other evidence of the "overt acts," only "when made during the "ſolemnity of an examination before a Ma-"giſtrate, or perſon having authority to take "it; when the party may be preſumed to be

[x] Caſe of Tonge, 1. Hale's Hiſt. P. C. 304.—Keil 18. 2. and 67.

[y] Foſter, pa. 242, 243.

" properly on his guard, and apprized of his " danger." However a greater and more exceptionable latitude of conſtruction, on this ſubject, appears in ſome inſtances [z] to have been admitted.

The confeſſion of a criminal, when taken even before a magiſtrate, can rarely be turned

[z] At a meeting of the Judges in January, 1707, to conſider ſome matters relative to the intended trial of Gregg for treaſon, Holt, Chief Juſtice, Powel, Powis, Smith, Dormer, and Bury, Juſtices, were all clearly of opinion, " that the priſoner's confeſſion, though not in court, might, " if proved by two witneſſes to have been voluntarily made, " notwithſtanding what is contained in the 7. W. 3. c. 3. " §. 2. be read as evidence againſt him. But Trevor, " Chief Juſtice, was of a contrary opinion, and Tracy, " Juſtice, doubted." I ſhould obſerve that this caſe is not in any reporter, but copied from Bacon's Abridgement, vol. 5th, 146.

The two learned Judges, who diſſented, had no doubts on a future occaſion, as to the admiſſibility of confeſſions on matters merely collateral; and in this diſtinction they ſeem to have proceeded on very ſolid grounds. For, in the caſe of Smith, who was indicted in June, 1709, for adhering to the Queen's enemies, " Alienage was the defence; " and his confeſſion, that he was an Engliſhman born, was " allowed to be admiſſible Evidence, by Trevor, Powel, Powis, Tracy, and Bury, though his council inſiſted on the act of the 7th of King William. Foſter's Rep. 243.

It is ſaid however, that Evidence of confeſſion was, without any ſuch diſtinction, holden ſufficient by the Judges, who ſat upon the commiſſion in the north in 1746. But the inſtances are not, I believe, in print; and " it is dan- " gerous (ſaith Sir Edward Coke) to report a caſe by the " ear, eſpecially concerning treaſon.

againſt

againſt him, without obviating the end, for which he muſt be ſuppoſed to have made it. Beſides, we have known inſtances of murders avowed, which never were committed; of things ſtolen, which never had quitted the poſſeſſion of the owner.

It is both ungenerous therefore, and unjuſt, to ſuffer the diſtractions of fear, or the miſdirected hopes of mercy to preclude that negative evidence of diſproof, which may poſſibly, on recollection, be in the power of the party; *we ſhould never admit, when it may be avoided, even the poſſibility of driving the innocent to deſtruction.* Nothing was more common in the beginning of the laſt century, than confeſſions of witchcraft. Sir James Melville mentions ſeveral inſtances in the proſecution of Earl Bothwell; and, though rather a ſceptical man, was candid enough to believe them. The poor women were accordingly burnt; and poſterity was furniſhed with a very accurate deſcription of the devil; who is ſaid to have appeared "in a black gown, with a black "hat on his head, in the attitude of preach-"ing, and with poſteriors as cold as ice."[a]

[a] Melvill's Memoirs, fol. pa. 194.

The evidence of words, alledged to have been ſpoken by the perſon accuſed, and connected with the criminality of the charge, ought alſo to be received with great diſtruſt. Such words are either ſpoken in the zeal of unſuſpicious confidence, and cannot be repeated without a breach of private faith, which detracts much from the credibility of the witneſs; or in the unguarded hours of boaſting diſſipation, in which caſe they are not unlikely to be falſe in themſelves, and very likely to be falſely repeated. Beſides, words may be very innocent when ſpoken, and highly criminal, when related; for their determinate ſignification depends much on the tone in which they are uttered. "It often "happens too, that, in repeating the ſame "words, a different meaning is conveyed, "which depends on their connection with "other things; and ſometimes more is ſig-"nified by ſilence, than by any expreſſion "whatever.[b]"

§. 3. Such are the principal rules, limitations, and reſtrictions, to which the Engliſh proſecutions of high treaſon are ſubjected in every ſtage of the proceſs.

[b] L'Eſprit des Loix 12. ch. 12.

Laſtly,

Laſtly, the poſitive teſtimony of a thouſand witneſſes to the poſitive allegation of the indictment is not concluſive, in any caſe, as to the verdict of the jurors. But they will ſtill retain an indiſputable, unqueſtionable right to acquit the perſon accuſed,[c] if, in their private opinions, they diſbelieve the accuſers; or if, in their conſciences, they think, however erroneouſly, that the fact partakes not of that degree, or ſpecies of criminality, with which it is charged in the indictment. They may, if they find doubts or difficulties in the caſe, require the direction of the court; but whether they be in any caſe *compellable*, either to have recourſe to that direction, or to ſubmit to it when voluntarily given, are queſtions, on which a very important diverſity of opinion hath appeared in the minds of great and good men.[d]

[c] "In the Caſe of 7. R. 2. Tit. Coronæ Fitz H. 108. "upon Acquittal of *a common thief*, the Judge ſaid, the "Jurors ought to be bound to their good behaviour during "their lives; But, ſaith the book, quære per quel Leg? "But that was only gratis dictum by the Judge, for no "ſuch thing was done." Vaughan's Reports.

[d] Vaughan's Reports, pa. 148. to 151. Commentaries, B. 4. pa. 344. Hale's Hiſt. P. C. 2. 313.

"It

" It is the privilege of Engliſhmen, ſay thoſe who ſupport the negative, to be tried by their equals; and that privilege will become *vox et præteria nihil*, whenever it ceaſes to be the duty of thoſe equals, to infer and conclude their verdict from the teſtimony of witneſſes, by the act and force of their own underſtanding.

Would it not, they continue, be a moſt prepoſterous doctrine, that they, who, under the obligation of a ſolemn oath, are choſen to try a fellow citizen for a crime, and as a criminal, and bounden by that oath to give a true verdict between the public and the priſoner according to the evidence; that, in this predicament, they ſhould be told, that the criminality or innocence of the intention, the legality or illegality of the fact, are matters of indifference, not ſubjected to their enquiry; and that their verdict ought not to be influenced by any ſuch conſiderations?

" To what end (ſaid Lord Chief Juſtice " Vaughan,) are the Jurors challenged ſo " ſcrupulouſly to the array and poll? To what " end muſt they have ſuch a certain freehold, " and be *probi et legales homines*, and not of

" affinity

" affinity with the parties concerned? To
" what end muſt they have in many caſes the
" view, for their exacter information chiefly?
" To what end muſt they undergo the heavy
" puniſhment of the villanous judgment? if,
" after all this, they implicitly muſt give a ver-
" dict by the dictates and authority of another
" man, when ſworn to do it, according to the
" beſt of their own knowledge? *A man cannot*
" *ſee by another's eye, nor hear by another's ear;*
" *no more can a man conclude, or infer the*
" *thing to be reſolved by another's underſtanding*
" *or reaſoning*; and though the verdict be
" right, the jury give, yet they being not aſ-
" ſured it is ſo from their own underſtanding,
" are forſworn, at leaſt in *foro conſcientiæ.*
" That *decantatum* in our books, *ad quæſtionem*
" *facti non reſpondent judices, ad quæſtionem legis*
" *non reſpondent juratores*, literally taken, is
" true; for if it be demanded, what is the
" fact? the Judge cannot anſwer it; if it
" be aſked, what is the law in the caſe? the
" jury cannot anſwer it. But upon all general
" iſſues, though it be matter of law, whether
" the defendant be a treſpaſſor, a debtor, diſ-
" ſeiſor, or diſturber, in the particular caſes in
" iſſue, yet the jury find not, as in a ſpecial
" verdict, the fact of every caſe by itſelf, leav-
" ing

" ing the law to the court: but find for the " plaintiff or defendant upon the iſſue to be " tried, wherein they reſolve both law and " fact complicately, and not the fact by itſelf; " ſo as though they anſwer not ſingly to the " queſtion, what is the law, *yet they deter-* " *mine the law in all matters, where iſſue is* " *joined and tried in the principal caſe*, ex- " cept when the verdict is ſpecial."

" Special verdicts," ſay the Commentaries on the Law of England, " ariſe, when the " jurors doubt the matter of law, and there- " fore chuſe to leave it to the determination " of the court."

" And it is (ſaith Sir Matthew Hale) the " conſcience of the jury, that muſt pronounce " the priſoner guilty, or not guilty, for to ſay " the truth, it were the moſt unhappy caſe, " that could be, to the judge, if he, at his " peril, muſt take upon him the guilt or in- " nocence of the priſoner; unhappy alſo for " the priſoner: for, if the Judge's opinion " muſt rule the verdict, the trial by jury " would be uſeleſs."

But, a contrary opinion hath been given by a learned and worthy Judge in very deciſive language."

language. " In every caſe (ſaith Mr. Juſtice " Foſter, p. 255) where the point turneth " upon the queſtion, whether the homi- " cide was committed, willfully and ma- " liciouſly, or under circumſtances juſtify- " ing, excuſing or alleviating; the matter " of fact, *viz.* whether the facts alledged by " way of juſtification, excuſe, or alleviation " are true; *is the proper and* only *province of* " *the jury*. But whether, upon a ſuppoſition " of the truth of the facts, ſuch homicide be " juſtified, excuſed or alleviated, muſt be ſub- " mitted to the judgment of the court." Again, p. 256, " when the law maketh uſe " of the term, malice aforethought, as de- " ſcriptive of the crime of murder, it mean- " eth, that the fact hath been attended with " ſuch circumſtances, as are the ordinary ſymp- " toms of a wicked, depraved, malignant " ſpirit." And, p, 257, " the *malus animus* " wl ich is to be collected from all circum- " ſtances, *and of which*, as I before ſaid, *the* " *court and not the jury*[e] *is to judge*, is what

[e] It is an obvious remark on theſe paſſages, that the learned writer hath reſted his poſition on the mere authority of an aſſertion, unſupported by argument or reference; and, in a ſubſequent chapter, I ſhall have occaſion to cite another paſſage from the ſame work, but of a very contradictory import.

" bringeth

" bringeth the offence within the denomina-
" tion of wilful malicious murder, whatever
" might be the immediate motive to it, whe-
" ther it be done as the old writers expreſs
" themſelves, *irâ vel odio, vel cauſâ lucri,*
" or from any other wicked or miſchievous
" incentive."

When wiſe and good men differ upon points of great conſtitutional importance; it is the duty of their humbler fellow citizens, to wait the reſult of that diſpaſſionate and candid difference, with a ſilent prayer, " *ne quid* " *detrimenti capiat res publica.*" To which however this may be added as a certain truth, that the political liberty of every individual bears a proportion to the ſecurity given by the laws to the innocency of his conduct; which ſecurity decreaſes, in proportion to the multiplication of penalties, the uncertainty of penal laws, and the irregularity of trials.

CHAP.

CHAP. XVI.

Of the gradual Improvements of criminal proceſs.

§. 1. IN the ſixth century, Clotarius, King of France, made a law, that nobody ſhould be condemned to death without a hearing.[f] Poſitive laws generally refer to a contrary uſage; it ſeems ſtrange therefore, that this, which I have mentioned, ſhould have been neceſſary in ſupport of the moſt obvious principle of juſtice. But the efforts of human wiſdom are ſlow in their progreſs, and limited in their extent; political ſyſtems therefore are, in all inſtances, though in different degrees, imperfect, and conſequently beſt underſtood by compariſon.

In this point of view, a ſhort ſtate of criminal proceſs by the common law of England will form a ſtriking illuſtration of the foregoing chapter, and may have a more eſſential effect; for it will be found, that in

[f] L' Eſprit des Loix, l. ~~12~~ 31. c. ~~11~~ 2.

proſecutions

proſecutions of felony, and in other particulars, we ſtill retain ſome veſtiges of that oppreſſive barbariſm, which I am about to deſcribe.

I ſpeak not of thoſe proceedings, which were founded in the groſs ſuperſtitions of our fore-fathers; ſuch as the preſumptuous purgation of ordeal, either by fire, or by [s] water; in which it was impoſſible for innocence to eſcape, without a miracle from Heaven: nor yet of that more unchriſtian, impious mode of trial by battle; which, when the defendant was innocent, often ended in his murder; and when guilty, in his triumphal acquittal, with the additional ſtain of the appellant's blood upon his head. My obſervations ſhall be confined to the boaſted, and venerable inſtitution of

[s] We find in the Welſh laws a third ſpecies of ordeal, unknown probably in all other countries. Femina matura viro quæ cum aliquo clandeſtino abierit, et vel in agris, vel in domo ſtuprum paſſa ſit, et ab illo poſtea repudiata fuerit, et querelam contra illum inſtituerit, apud gentiles ſuos et in curia, hoc modo dotabitur. Si tauri trimi caudam detonſam, et ſebo inunctam, per januam vimineam immiſſam, mulier intra domum, pedibus limini innixis, manibus prehendens detinere potuerit, licet taurus a duobus hominibus utrinque ſtimulis urgeatur; pro ſuo habebit in compenſationem, ob infamiam violatæ pudicitiæ: ſin aliter, habebit tantum ſebi, quantum manibus adhæſerit. Legis Wallicæ, fol. p. 82.

trial

trial by jury, its preparatory proceſs, conduct, and conſequences.

§. 2. The ancient *Juſticiarii in itinere* made their circuit round the kingdom, for the purpoſe of trying cauſes and criminals, only once in ſeven years; in which interval, under the common calculation of lives, it is probable, that, excluſive of the diſtreſſes, and conſequent depopulation of families, one half of the wretches under ſuſpicion, and in cuſtody, died in the dungeon. At all events, the crime had generally eſcaped the memory of mankind, before the execution of the criminal. But this was remedied ſo early as A.D. 1285, by ſtat. 13 Ed. 1. c. 30. whence the preſent Juſtices of aſſize, and *Niſi Prius* are derived; an inſtitution, which bears ſome reſemblance to one of the cuſtoms aſcribed by Tacitus to the ancient Germans; *eliguntur in iiſdem conciliis et principes, qui jura per pagos vicoſque reddunt. Centeni ſingulis ex plebe comites, conſilium ſimul et auctoritas, adſunt.*[h]

§. 3. The temporary releaſe of the priſoner, previous to the trial, when the criminal charge

[h] Tacit. de Mor. Germ. c. 12.

was apparently unjuſt, or ill founded; or when the crime was of ſo inferior a nature, as to admit his enlargement on pledges for his future appearance, ſeems in the earlieſt periods of our conſtitution, to have been a matter of right; but the courtly pliability of ſome Judges had involved this doctrine in very oppreſſive difficulties. Theſe were at length happily, and totally removed,[1] in 31 C. 2. whoſe reign, though in its conſequences happy to this kingdom, was a ſtrange medley of liberty and tyranny, honor and profligacy, religion and impiety, benevolence and bloodſhed.

In every ſtage both of civil and criminal ſuits, the laws, like the prayers,[k] were adminiſtered in an unknown language; and this continued, as to matters of record, indictments, pleas, verdicts, judgments, &c.

[1] Stat. 31. c. 2. ca. 2. "This act was carried by an "odd artifice in the Houſe of Lords; Lord Grey and "Lord Norris were named to be the Tellers; Lord Norris, "being a man ſubject to vapours, was not at all times attentive to what was paſſing; ſo a very fat Lord coming in, "Lord Grey counted him for ten, as a jeſt at firſt, but "ſeeing that Lord Norris had not obſerved it, he went on "with this miſreckoning of ten, and by theſe means the "bill paſſed, though the majority was indeed on the other "ſide." Biſhop Burnet, 2d vol. 8vo. p. 121.

[k] Commentaries, 4. 412.

until

until the 12 ſtat. Geo. 2. c. 26. They were alſo written in a ſtrange hand, with technical abreviations. In this there was real danger; for though the indictment was always read to the priſoner in Engliſh; yet, if there were any objections, recourſe was had to the latin original to ſupport its inſufficiencies, *contra formam ſtatut. in hujuſm. caſ. edit. et proviſ.* (ſays Lord Hale) ſhall be conſtrued either ſingularly or plurally. We cannot wonder then at the recital of the above-mentioned [1]ſtatute, that "many and great miſchiefs do frequently "accrue to the ſubjects of the kingdom, "from the proceedings in courts of juſtice "being in an unknown language; thoſe who "are impleaded having no knowledge, or un-"derſtanding of what is alledged for, or againſt "them in the pleadings of their lawyers and "attorneys, who uſe a character, not legible "to any, but perſons practiſing the law." But we may reaſonably wonder, that the remedy was deferred to the eighteenth century.

§. 4. The chriſtian name, and ſurname of the defendant, with his addition of ſtate, and degree, were firſt required, to be ſet forth in

[1] 12 G. 2. c. 26.

the indictment, by an act of Henry the Fifth.[m] One may infer, that, previous to this act, there was a great want of preciſion, in the formal parts of proceſs; but the inclination of ſucceeding Judges in favor of life hath carried this matter to the oppoſite extreme of ſcrupulous, and over-grown nicety. Numberleſs are the inſtances, in which the ſubſtance of juſtice hath been loſt in the purſuit of the ſhadow of mercy.[n]

The diſcontinuance of latin indictments hath rendered ſuch inſtances leſs common; but there is ſtill ſufficient reaſon, to apply the obſervation of Sir Matthew Hale: "for the "truth is, that it is grown to be a blemiſh,

[m] 1 H. 5. c. 5.

[n] For inſtance, murdredavit for murdravit, feloniter for felonice, have been adjudged to vitiate the indictment; burgarites for burglarites hath been a fatal objection, but burgulariter hath been holden good. Yet theſe exceptions were allowed on the idea of uncertainty, not from an inclination to claſſical accuracy; for *præfato reginæ* did not vitiate. 31 Eliz. Webſter was indicted for murder, and the ſtroke being laid ſiniſtro bracio inſtead of brachio, he was diſmiſſed. 31 H. 8. an indictment being charged "ſibella B. "nuper de C. uxor J. B. nuper de C. ſpinſter;" it was deemed inſufficient, becauſe "ſpinſter" was thought equally applicable to the huſband. So in Leke's caſe, 34 Eliz. A. B. alias dictus A. C. butcher; it ought to have been A. B. butcher, alias dictus A. C. butcher. So, gladium in dextra ſuâ, without "manu". 5 Co. Rep. 121. Dyer 46. 4 Co. ep. 39.

"and

" and inconvenience in the law, and the ad-
" miniſtration thereof; more offenders eſcape
" by the over-eaſy ear given to exceptions in
" indictments, than by their own innocence;
" and many times groſs murders, burglaries,
" robberies, and other heinous and crying
" offences, eſcape by theſe unſeemly niceties,
" to the reproach of the law, to the ſhame
" of government, to the encouragement of
" villainy, and to the diſhonour of God."[o]

§. 5. At the common law,[p] no priſoner, in capital caſes, was intitled to a copy of the indictment, or pannel, or of any of the proceedings againſt him. It was refuſed to Sir Harry Vane, and Col. Sydney. It was again much urged in the trial of Lord Preſton, A. D. 1690, who deſired to have it argued by counſel, which the court unanimouſly refuſed, " it being a point, that would not bear a de-
" bate."

§. 6. It appears to have been a common practice, ſo late[q] as the reign of Charles 2, for

[o] Hale's Hiſt. P. C. 1. 193.
[p] Foſter, p. 228. 4 Stat. Tr. 411.
[q] Vaughan's Rep. p. 153. Hale's H. P. C. 2. 160.

the Judges in their circuits to impoſe arbitrary fines on Grand Juries for ſuppoſed concealments and non-preſentments; a dangerous exertion of power, not warrantable by law.

§. 7. There were ſeveral means at common law of bringing felons to trial, without any previous indictment; ſuch as, upon the Mainouvre, when the thief was detected with the thing ſtolen *in manu*, and upon appeals.

The latter mode, *of appeals*, is ſtill ſubſiſting; and, though conſidered as odious by ſome, doth not appear in any inſtance to have occaſioned injuſtice. Perhaps it ought to be regarded as an old branch of the law, which by poſſibility may become an eſſential ſafeguard to the rights of the people. It muſt however be admitted to have ariſen from that ancient barbarous principle of legiſlation, which exacted the puniſhment of the criminal merely as civil damages to the party injured;[r] and accordingly I find, that in the ancient ſalic laws murder was puniſhed with death, and no compoſition admitted, unleſs with the conſent of

[r] Kairn's Hiſt. Law Tracts, p. 40. See alſo Robertſon's Hiſt. of Charles the Fifth, vol. 1.

the

the neareſt friend of the deceaſed. From a ſimilar reaſoning, it continues at this day the law of Saxony, that, if a thief ſuffer death, his heir is not compellable to reſtore the ſtolen goods.[s]

Appeals by indifferent perſons, which, eſpecially in matters of treaſon, were frequent in parliament,[t] are aboliſhed by ſtat. 1. H. 4. c. 14. "for the many great inconveniences "and miſchiefs, which had often happened "thereby." A cuſtom of this kind is obſerved by Tacitus, to have prevailed among the Germans; "*licet apud concilium accuſare* "*quemque, et diſcrimen capitis* [u]*intendere.*"

§. 8. I now proceed to the arraignment of the Priſoner; in which ſtage of the proceſs, as he muſt be preſumed to be free from guilt, he ought not to be required to hold up his hand at the bar.[w] It is a ſort of inſult upon innocence; nor is the ceremony of kneeling at the bar, as if juſtice were the conſequence of intreaty, leſs liable to objection. In the former

[s] Carpzovius, 4. 32. 23. [t] 3. Inſt. 31. 132. 1 Mod. 148.
[u] de Mor. Germ. c. 12.
[w] Lord Bacon mentions a Welſhman, who, when ſummoned to comply with this ceremony, conceived the judge to be a fortune-teller.

practice, though diſpenſible, (for any criminal may refuſe to hold up his hand) we ſtill purſue the ſteps of our anceſtors; the latter doth not appear to have been anciently uſed.[x]

It is the law of the land, and certainly ever hath been ſo, that a priſoner ought not at any time to be charged with fetters;[y] unleſs the Gaoler be conſtrained to have recourſe to them by the actual neceſſity of ſafe cuſtody. In the trial of the regicides it was determined by all the judges,[z] "that when priſoners come to the "bar to be tried, their irons ought to be "taken off, be their crimes ever ſo great." And this agreed with Fleta[a] "*Cum autem capti "in judicio produci debeant, non producantur "armati, ſed ut judicium recepturi; nec ligati, "ne videantur reſpondere coacti.*"—Yet Pratt, Chief Juſtice, in the trial of Layer,[b] ventured to make a diſtinction between the time of ar-

[x] State Tryals 1. pa. 83. D. of Norfolk's Tryal, A. D. 1571. and pa. 157. Earl of Arundel's Tryal.

[y] Grand abuſion eſt. que priſonner ſoit charge de ferres, ou miſe en peine, avant ceo que ſoit attaint de felony. Myrrour. ca. 5. §. 1. 54.

[z] Kelynge Reports. [a] L. 1. ca. 1.

[b] "My Lord (ſaid Layer) I have been uſed more like "an Algerine captive, than a freeborn Engliſhman; I have "been dragged through the ſtreets by the hands of Gaolers, "and have been made a ſhew, and ſpectacle. *I now hope to "have theſe chains taken off, that I may have the free uſe of*

"that

raignment and the time of trial, and would not allow the chains to be taken off. His Lordſhip did not conſider, that the diſtraction of the mind, in ſo painful and important a criſis, ought not to be aggravated by the tortures of the body. *The rights of the unhappy have been rarely violated in modern times.*

It is thought by a very learned writer,[c] that the dreadful puniſhment, inflicted on a refuſal to plead, was unknown to the common law, and derived from a ſtatute of Edward 1ſt. Be this as it may, it ſtill exiſts in full force; though repugnant to the ſpirit of our conſtitution, and nearly allied to torture, which was always illegal, though ſometimes practiſed.[d] The commentaries on the laws of England have in very pathetic terms,[e] called for the legiſlative abolition of this cruel proceſs; and ſurely it would be eaſy in felonies, as in the caſe of treaſon, to conſider an obſtinate refuſal to plead, as a confeſſion, and con-

" *that reaſon and underſtanding which God hath given me*; They " have brought the ſtrangury upon me to a very painful " degree, and *I am told your Lordſhip is afflicted with that* " *diſtemper*." This was argumentum ad hominum, but it was ineffectual.

[c] Obſervations on the ancient ſtatutes, pa. 62.

[d] Foſter, 244.—Ruſh. 1. 638. [e] B. 4. pa. 323.

viction

viction of the charge; or even as a plea of not guilty, which is the practice of the Scotch law.

But alteratives, though preferable to abſolute neglect, are an inſufficient ſpecies of medicine, when the cauſe of the diſeaſe is ſuffered to remain. If the forfeitures,[f] annexed to the conviction of the crime, were in all caſes equally extended to the contumacy of ſtanding mute; there would be no temptation to commit the offence; which, in the preſent ſtate of the law, is generally founded on the becoming principle of parental tenderneſs.

§. 9. It was formerly uſual for the priſoner, if he thought the charge indefenſible, to confeſs the indictment, and be admitted, on his own requeſt, to become an approver againſt others of the ſame felony; upon the conviction of whom he was entitled to his pardon. This practice never was prohibited by law, but gradually diſcouraged and diſuſed; "for "the truth is (ſaith Sir M. Hale) that more "miſchief hath come thereof by falſe accu- "ſations of deſperate villains, than benefit to

[f] See Mr. Emlyn's Preface to the State Tryals.

"the

"the public by the diſcovery, and conviction "of real offenders." Yet I obſerve with reluctance, that certain modern acts of parliament [g] have in ſome degree unwarily revived this dangerous doctrine, by the frequent offers of rewards and pardons to capital felons, on diſcovery and conviction of their accomplices; and in ſome inſtances,[h] it is expreſſly provided, that the ſums of money to be given to the apprehenders, and convictors of felons, ſhall not incapacitate their teſtimony. The price of blood ſhould in no caſe receive the legiſlative ſanction.

In Italy (ſays Puffendorf) pardons are ſometimes promiſed by public edict to any of the banditti, that ſhall bring with him the head of another of the ſame gang. It may be good policy to raiſe mutual jealouſies among villains; but there is ſomething very ſhocking in the Idea of murder, by law eſtabliſhed.

§. 10. But if the defendant thought it adviſeable to plead, he was entitled firſt to pleas

[g] 4. and 5. W. and M. c. 18.—10. and 11. W. 3. c. 3.—5. Ann. c. 31.—29. Geo. 2. c. 30.—6. and 7. W. 3. c. 17. §. 9.—6. Geo. 1. c. 23.—8. Geo. 2. c. 20.

[h] 8. Geo. 2. c. 16. §. 9.

declinatory

declinatory of his trial; namely the plea of ſanctuary, which was followed by attainder, and forfeiture [i] of land and goods; and the plea of clergy, which ſoon ceaſed to be pleaded, until after conviction; it being more beneficial to the party, to take the chances of an acquittal in the courſe of the trial.

Of the former of theſe pleas I have already given a ſhort account; and I feel little inclination to enter more largely on the latter. Mr. Juſtice Foſter has very forcibly obſerved, that "it was an abſurd diſtinction between "ſubject and ſubject, originally owing to "downright impudence on the one part, and "to mere fanaticiſm, or amazing puſillanimity on the [k] other." During a long courſe of years, it exempted offenders, qualified for holy orders, from the puniſhment of offences of the moſt atrocious kind, murders not excepted. The reading of a ſcrap of latin, "*Miſerere mei Deus*," called with great propriety "the Neck verſe," was the criterion of this ſenſeleſs privilege. Women, and all perſons unable to read, were expoſed without

[i] Upon the actual abjuration, 2. Hawk. 52. Finch, 389. 3. Inſt. 217.

[k] Foſter, pa. 306.

mercy

mercy to the literal rigour of the law. It was a great offence in goalers to teach criminals to read during their impriſonment, previous to their trial; "*Per cauſe de ſalvation de* "*leur vie, et deſturbation de la common ley, en* "*deceit del* [1] *roy.*" Many illiterate perſons were actually executed for clergeable felonies; and Lord Chief Juſtice Kelynge informs us, that he, in the year 1665, fined a biſhop's chaplain, for having reproached his ſacred function, and abuſed the court, by anſwering "*legit*" upon the demand of "*legit aut non legit?*" Whereas in truth the priſoner, when examined by his Lordſhip himſelf, could not read, *and was thereupon not admitted to his clergy.*

Women, in caſes of grand larceny to the value of ten ſhillings, were admitted to clergy by the 21ſt James 1ſt. The wall of partition was at laſt entirely removed by the ſtatute of the 3 & 4 W. & M; which entitles women to the *privilegium clericale*, equally with men; and by the 5th of Queen Anne, which aboliſhed the whole ceremony of reading.

[1] Liber Aſſiſ. pa. 138. Obſerva. on the anc. ſtat. 351.

Here

Here it is to be wiſhed, that the legiſlature had advanced one ſtep further to an open declaration, that all offences, proper in the firſt inſtance to be exempted from capital puniſhment, and now called clergeable, ſhould hereafter, in that firſt inſtance, be conſidered as pardonable; with a power to the judges to tranſport the convicts, whenever the dangerous nature of their crime and character ſhould make it expedient.[m] At preſent, ſuch offenders, upon conviction being made to kneel, they know not why; and to pronounce an expreſſion, which they do not underſtand, find themſelves, in the height of their amazement at this cabaliſtical ceremony, once more upon the wide world in perfect liberty. *It is wonderful, how much the exemplary ſolemnity of juſtice may be diſgraced by trivial abſurdities.* Beſides, from the rule that this privilege cannot be pleaded more than once (except by clerks in orders, in regard to whom it is ſtill unlimited) it follows, that, when a man commits two offences, both clergeable in their claſs, but totally different in their kind, as manſlaughter and petty larceny, he muſt ſuffer death for

[m] As was enacted in the caſes of great and petty larceny, by ſtatutes 4. Geo. 1. c. 11. and 6. Geo. 1. c. 23. which proviſions however do not extend to Clerks in Orders.

the

the ſecond, though in the eye of reaſon it hath no perceptible connection with the firſt.

§. 11. But to return to the ancient mode of proſecution. Let us ſuppoſe the priſoner to have pleaded, "not guilty." Here began his trial; and in the progreſs of it he was expoſed to ſuch dangers, as left him but little ſecurity even in the ſtricteſt innocence.

It appears, that, ſo late as the whole ſixteenth, and part of the ſeventeenth Century, the firſt and moſt eſſential principles of evidence were either unknown, or totally diſregarded. Depoſitions of witneſſes, forthcoming if called, but not permitted to be confronted with the priſoners; written examinations of accomplices, living, and amenable; confeſſions of convicts, lately hanged for the ſame offence; hearſays of thoſe convicts, repeated at ſecond hand from others; all theſe formed ſo many claſſes of competent evidence, and were received as ſuch, in moſt ſolemn trials, by very learned judges.

It was ſometimes agreeable to the counſel for the Crown, and ſuitable to the nature of the caſe, to conduct the proofs by parole teſtimony;

timony; a circumſtance moſt unfavourable to the Defendant, as it tended to throw the whole weight of credulity into the adverſe ſcale. For the perſon accuſed was rarely permitted to call witneſſes to his exculpation; and, even when indulged ſo far, he was not in any caſe allowed to examine them upon oath. At the ſame time, there was frequent practiſing on the hopes and fears of all the witneſſes, by the alternate encouragements and menaces of the counſel for the proſecution; and juries were reminded, that, for verdicts contrary to the inclination of the court, they were liable to unlimited fines and impriſonments. This indeed they had learnt by fatal and re-iterated experience; but they were rarely in want of any memento; for it was a common, and very lucrative practice with the ſheriffs, to return jurors ſo prejudiced, and partial, that, as Cardinal Wolſey obſerved, "they would find Abel guilty of the murder "of [a] Cain."

The Judge held his office, and income, during the pleaſure of the proſecutor;[b] and

[a] Obſervations on the anc. ſtat. pa. 360.

[b] It may ſafely be affirmed, that the preſent independence of our Judges is the beſt ſafeguard of our conſtitutional liberties.

was often actuated by an intemperate zeal in the ſupport of the charge; as if his indignation at the offence had ſtifled all tenderneſs towards the ſuppoſed offender.

Thus, ignorant of the forms and language of the whole proceſs, unaſſiſted by counſel, unſupported by witneſſes, diſcountenanced by the court, and baited by crown-lawyers, the poor bewildered priſoner found an eligible refuge in the dreadful moment of conviction.

§. 12. This ſhort ſketch of the adminiſtration of criminal juſtice in the ſixteenth century diminiſhes the ſurprize, which We ſhould otherwiſe feel, when we are told,[p] that in the reign of Henry the 8th, ſeventy-two

liberties. The ſtat. 1. Geo. 3. c. 23. engraſted on 13. W. 3. c. 2. hath completed that independence, in regard to the King, his Miniſters, and Succeſſors; and in the ſecurity of the full ſalaries during the continuance of the commiſſions. Yet it deſerves ſerious conſideration, whether thoſe ſalaries, amidſt the general opulence of the kingdom, be more than barely ſufficient to ſupport the ſtate and dignity of the offices, to which they are annexed. It is of eſſential importance to every individual in the nation, that the ſeats of Juſtice ſhould continue to be filled by men the moſt eminent in their profeſſion for Wiſdom, Learning, Experience, Benevolence, and Integrity.

[p] Holingſhed—See Obſervations on the Ancient Statutes, pa. 402.

thouſand criminals were executed; which, upon an average, is nearly equal to ſix every day, Sundays included. The ſame authority aſſures us, that executions were reduced to about one fifth of this proportion in the latter end of Queen Elizabeth's reign. The annual number is at preſent eſtimated at one hundred.

Thus "when people of all ranks and conditions had, in their turn, been taught "moderation in the ſchool of [q] adverſity," Reaſon and Mercy gradually prevailed; but an ample field is ſtill open to the exertion of their influence.

The peruſal of the firſt volume of the Engliſh State Tryals is a moſt diſguſtful drudgery; but it is impoſſible to ſurvey that chaos of oppreſſions, ſo long exiſtent, and ſo patiently born, without being aſtoniſhed at the foundation, on which the beautiful fabric of our preſent liberties is raiſed.

[q] Foſter, 235.

CHAP.

CHAP. XVII.

An Obſervation on the Law of Evidence.

§. 1. *LES loix, qui font périr un homme ſur la depoſition d'un ſeul temoin, ſont fatales a la liberté. La raiſon en exige deux; parce qu'un témoin qui affirme, et un accuſé qui nie, font un partage; et il faut un tiers pour le vuider.*

Les Grecs, et les Romains exigeoient une voix de plus pour condamner. Nos loix Françoiſes en demandent deux. Les Grecs prétendoient, que leur uſage avoit été établi par les Dieux, mais c'eſt le nôtre.[r]

It may be doubted, whether the plea of the priſoner, which is dictated by the ſenti-

[r] Monteſquieu, l. 12. ch. 3.—the civil Law extended this requiſition to all caſes whether civil or criminal. "Unius reſponſio teſtis omnino non audiatur, Cod. 4. 20. 9. Vox unius vox nullius eſt. Harmonius, l. 1. ca. 6. See the Commentaries on the Law of England, 4. 351.

ment of ſelf-preſervation,[a] can with any propriety be ſaid to counterbalance the ſolemn oath of his diſintereſted accuſer. Yet ſuch were the ſentiments of the preſident Monteſquieu, and ſuch hath been the uſage of many great and learned nations. The law of England hath ſeen reaſon to reject an idea, which, if ſtrictly adhered to, would give the privilege of impunity to every crime, however flagrant in its nature, if committed in the preſence of one perſon only. Except therefore in caſes of treaſon, in which the principles of our conſtitution demand peculiar ſtrictneſs of proof; one witneſs, if credited, is with us ſufficient to eſtabliſh the conviction of any capital crime, and indeed of any offence whatever. I ought perhaps to except the caſe of perjury, in which, a ſingle unſupported witneſs would be adjudged inſufficient; for the oath of the accuſer being placed in oppoſition to the oath of the accuſed, truth remains ſuſpended. In

[a] It is not unuſual, even at this day, upon the Continent, to adminiſter an oath to the ſuppoſed criminal, in order to extort the truth from him; reducing him (ſays the Marquis Beccaria) to this terrible alternative, either of offending God, or of contributing to his own immediate deſtruction; and leaving him only the choice of becoming a bad Chriſtian or a Martyr.

ſuch

ſuch a ſituation, the ſcale of innocence ſhould be preſumed to preponderate.

The nature of my deſign will not permit me to extend this digreſſion upon criminal proceſs to an enquiry into the general principles of evidence. It is however a field ſtill open to inveſtigation. For the conſiderations of ſome very ingenious writers on this ſubject, have been too much influenced by their acquieſcence in practical authority; and we are furniſhed, rather with uſeful and ſenſible hiſtories of what the law of evidence actually is, than with any free and ſpeculative diſquiſition of what it ought to be.

CHAP. XVIII.

Of other Crimes immediately relative to the State.

§. 1. UNDER this head are proper to be conſidered all offences, below the degree of treaſon, which amount to violations

lations of the prerogative, or infractions of the public peace; and, in ſhort, all the inferior offences, which directly affect the King, and his government.

It is ſaid, that in Japan, every breach of any law of a public nature, and every diſobedience to the miniſters of juſtice, is conſidered as a perſonal affront to the Emperor, and puniſhed as a capital crime.[t] The conſequence is evident. The Emperor's authority is univerſal and unlimited; an authority ſo unnatural, is not likely, if it be allowed poſſible, to be ſupported, without a conſtant violation of the rights of nature.

The human mind is delighted with the exerciſe of power, and at the ſame time incapable of indulging an extreme eagerneſs in any purſuit, without running into abſurdity. Hence it follows, that the penal laws of deſpotic ſtates are both wanton and ſanguinary; and that the puniſhment of death is adapted, like

[t] A ſimilar account is given of the courſe of juſtice in Peru, where every crime is conſidered as a breach of the commands of the Ynca, who is reverenced as ſomething more than human. Garcilaſſo de la Vega, Com. Reg. l. 2. c. 12, 13.

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the bed of Procruſtes, to offences of all ſizes and denominations. Very different ſhould be the ſentiments, and practice of that envied nation, which hath diſcovered, and eſtabliſhed a permanent ſyſtem of government, in the happy medium between lawleſs liberty, and abſolute deſpotiſm.

§. 2. An accurate examination of this ſpecies of crimes would lead me into a tireſome detail; I ſhall confine myſelf to ſome of the moſt ſtriking inſtances.

The mere knowledge and concealment of treaſon, without any degree of aſſent thereto, is called in our law, a miſpriſion of treaſon; and is puniſhed with the loſs of the profits of lands during life, forfeiture of goods, and *impriſonment during life*.[u] It is alſo by 14 Eliz. c. 3. a miſpriſion of treaſon to forge any foreign coin, though not made current by proclamation. By ſtat. 9 Ed. 3. ſt. 2. no ſterling money ſhall be melted down upon pain of forfeiture thereof. This law is written in a very

[u] Ph. & M. c. 10. Previous to which ſtatute, every concealment, under the conſtruction of aiding and abetting, ſeems to have been conſidered as treaſon.

different ſpirit from the ſtat. 8 & 9 W. 3. c. 26. which enacts, that, if any perſon ſhall receive, or pay any counterfeit, or diminiſhed money of this kingdom, at a leſs rate than it ſhall import to be of, he ſhall be guilty of felony.

By 9 Geo. 2. c. 30. enforced by 29 Geo. 2. c. 17. if any ſubject of Great Britain ſhall enliſt himſelf, or if any perſon ſhall procure him to be enliſted, in any foreign ſervice, or detain or embark him for that purpoſe, without licence under the King's ſign manual, he ſhall be guilty of felony without benefit of clergy; *a very ſevere law!*

Deſertion from the King's armies, in time of war, is alſo made a capital felony by ſtat. 2, 3 Edw. 6. *and the offence is made triable by the juſtices of every ſhire.* This offence was ſubjected by the laws of Canute to the loſs of life and lands.*

* Servus etiam aufugiens a domino ſuo vel a ſocio ſuo per ſegnitiem ſuam, ſive ſit in navali expeditione, ſive in terreſtri, perdat omne quod habet, et propriam vitam, et capiat dominus poſſeſſionem illam ac terram ejus quam ipſi prius dedit. Et ſi propriam terram habeat, regis manibus ea tradatur. Leges Cnuti 75.

It was anciently the cuſtom in France to cut off the ears, or ſlit the noſe of the deſerter; and it was abſurd, ſays Monteſquieu, to relinquiſh this practice for the puniſhment of death.

Priſon-breaking by the offender, when lawfully committed, was at the common law a felony in every caſe; but by ſtat. 1 Edw. 2. no perſon ſhall for breaking priſon have judgment of life or member, except the cauſe for which he was impriſoned, would have had ſuch judgment, if he had been duly tried and convicted.

Our law, even with this mitigated ſeverity, is contrary to the natural impulſe of ſelf-preſervation.[x]

The reſcue or forcible freeing of another from an arreſt, or impriſonment, is alſo, in many caſes, a felony without benefit of clergy.

The unlawful aſſembling, to the diſturbance of the peace, by any twelve perſons, who, being ſo aſſembled, ſhall continue to-

death. Soldiers are habituated to the idea of death; ſo that the terrors of the penalty were diminiſhed, while they were intended to be increaſed. L'Eſprit des Loix, l. 6. c. 12.

[x] I ſhall tranſcribe the words of a very ancient writer on this ſubject:

Abuſion eſt a tenir eſcape del priſon, ou de bruſerie de gaole, per peche mortelle, car cell uſage n'eſt garrant per nul ley; ne en nul partie eſt uſe, forſque en ceſt realme et en France; eins eſt len garrantiè de ceo faire per ley de nature. Myrrour p. 283.

gether

gether for one hour, after proclamation made to diſperſe, is capitally puniſhed by ſtat. 1 Geo. 1. c. 5.

All forcible acts of ſmuggling, carried on in defiance of the laws, or even in diſguiſe to evade the laws, are by ſtat. 19 Geo. 2. c. 34. made felonies without the benefit of clergy.

In this branch of the penal ſyſtem, law-givers ſhould be extremely cautious, not to confound atrocious breaches of the civil contract, with ſimple violations of the police.

CHAP. XIX.

Of Murder.

§. 1. AN Engliſh gentleman, ignorant of Engliſh law, would probably confine his ideas of homicide to the two diviſions, of "murder" and "excuſable "killing;" and, when informed, that the law of England comprehends ſeveral other claſſes, both in name and puniſhment, would profeſs himſelf unable to diſcover any ground of further diſtinction.

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" The act of homicide (he would ſay) is " either murder, or it is not ſo. The inten- " tion of the killer is the criterion; and the " malignity of that intention is in the nature " of a ſingle, controverted fact, ſubjected to " enquiry, and capable of ſtrict proof. If " that malignity be not ſuggeſted, or if on " ſuggeſtion it be diſproved, the act of kil- " ling becomes, as to civil guilt, negative, " and excuſable."

There is ſomething in the firſt view of this poſition very plauſible. An Engliſh lawyer would give the following anſwer to it.

" The act of homicide is either occaſioned " by mere accident, or founded in the diſ- " penſations of public juſtice, or in ſelf-pre- " ſervation, or in a ſudden tranſport of paſſion, " or in malice; and, in theſe different views, " it is capable of a great variety of gradations, " from abſolute innocence to the moſt aggra- " vated guilt.

" True (it would be replied) every crime " hath its proper degree of enormity, variable " as the mind of the criminal; but you miſ-

" apply

" apply the property of the crime to the act,
" on which the crime is founded. That act,
" in itſelf, and abſtractedly conſidered, is a
" ſimple conſequence of the attributes of mat-
" ter; unfortunate indeed and pitiable; but
" neither culpable, nor puniſhable, until it be
" proved to have co-operated with a miſ-
" chievous intent. When that proof is given,
" then, and not before, it becomes criminal,
" under the appellation of murder."

Here then we are reduced to ſtate the law as we find it; and to leave its doctrines to their own ſupport and defence.

§. 2. I begin with that claſs, to which our laws annex no idea of guilt; and which is called juſtifiable homicide. It is founded on neceſſity, and, in ſome inſtances, on the poſitive precept of law.

Such is the caſe of the Judge, who paſſes ſentence of death upon a convicted criminal, and gives the warrant for his execution; and ſuch, more immediately, is the caſe of the Sheriff, who cauſes that warrant to be executed.

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On this point it hath been holden,[y] that, "if "the execution vary from the judgment, it "will be murder in the Sheriff." But this muſt be underſtood[z] of ſuch a varying only, as tends to aggravate the puniſhment beyond the intention of the law; not of any mitigation, in regard to the pain, or infamy of the ſentence, at the ſame time conſiſtent with the ſubſtantial juſtice of the cauſe.

Women, convicted of either high, or petty treaſon, are directed by judgment of law *to be burnt in the fire, till they are dead*; yet Sheriffs have generally had humanity enough to direct them to be ſtrangled, before the fire can affect them. It is the ſentence of traitors, to be hanged by the neck, *but not till they be dead*; yet it is now[a] the practice, and very properly, not to ſuffer them to be cut down, in order to

[y] Hale's Hiſt. P. C. 2. 411. And Bracton, l. 3. p. 104. non alio modo puniatur quis, quam ſecundum quod ſe habeat condemnatio.

[z] Foſter, p. 269.

[a] Aſhton, Jan. 19, 1690, at the Old Bailey, and Matthews the printer, Oct. 32, 1719, at the ſame place, were ſentenced for high-treaſon; and were hanged until they were dead, without even any ſubſequent quartering or beheading. State Tr.

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the ſubſequent mangling of their bodies, whilſt any appearance of life remains.

Upon the ſame principle of mercy, a curious doubt hath ariſen on this ſentence of treaſon; whether, if the King ſhould in any caſe remit all but the hanging, it would not be murder in the Sheriff, to hang the criminal until he be dead.

But I proceed to that homicide, which is juſtifiable by permiſſion of law; and ſuch it is, when any man reſiſteth perſons in the due courſe of juſtice,[b] having authority to take, or impriſon him, though perhaps he be innocent, and is killed in the ſtruggle. This rule is founded in reaſon and public utility; *but there ſhould be an apparent neceſſity on the ſide of the officer.*

The ſame benignity of conſtruction is extended to homicide, committed by any perſon, interpoſing to preſerve the public peace, and prevent miſchief; for ſuch interpoſal is a branch of ſocial duty.

[b] The antient expreſſion in the caſe either of flight, or of reſiſtance, was "quod juſticiari ſe non permiſit."

In

In like manner, officers, endeavouring to diſperſe a riotous or rebellious aſſembly, are juſtifiable, both by the common law and by ſtatute,[c] though death ſhould enſue. *But here alſo there ſhould be an actual, exiſtent neceſſity*, otherwiſe it will be murder; and of this neceſſity the law will exact a rigorous proof. And though it hath been adjudged, that thoſe, who attend the Juſtices in order to ſuppreſs a riot, have power to take with them ſuch weapons, as ſhall enable them *effectually*[d] to do it; yet the miſapplication of that power to wanton or tyrannical purpoſes, will be moſt ſeverely conſtrued. It is indeed a power dangerous to the conſtitution, and to be guarded with jealouſy againſt all abuſe.

Laſtly, homicide is juſtifiable in the reſiſtance of any capital crime, attempted and accompanied by violence. As,[e] in the caſe of

[c] 1 Hale, H. P. C. 465. 1 Hawk. P. C. 161. Popham 121, 122. And ſtat. 1 Mary, ca. 12. 1 Eliz. ca. 16. which were both temporary acts. And 1 Geo. 1. c. 5. to the ſame purport which is perpetual.

[d] 1 Hawk. P. C. p. 161. §. 21.

[e] Hadrianus reſcripſit eum, qui ſtuprum ſibi, vel ſuis, per vim inferentem occidit, dimittendum.

Dig. l. 48. t. 8. §. 1.

any

any woman, who kills a raviſher in defence of her chaſtity; or of any traveller, who in the immediate defence of his property ſhoots a highwayman; or of any perſon in an attempt to commit burglary. The ſame idea prevailed in the civil law. *Furem nocturnum ſi quis occiderit, id impune feret, ſi parcere ei ſine periculo ſuo non potuit.* And again, *ſi quis percuſſorem ad ſe venientem gladio repulerit, non ut homicida tenetur; quia defenſor propriæ ſalutis in nullo peccaſſe videtur.*[f]

But here it is obſervable, "that our law "will not ſuffer any crime to be prevented by "death, unleſs the ſame, if committed, "would have been capitally puniſhable." Hence it hath followed, that, though it be lawful for a man to kill another, whom he detected in the night time, in the act of carrying away his property; yet if he take another in the act of adultery with his wife, and kill him, it will be manſlaughter and felony. Such is the law, though in fact it hath been executed with great benignity.[h] And ſurely, if the former caſe be juſtifiable, the latter,

[f] Domat. l. 2. p. 638. [g] Commentaries, 4. 102.

[h] John Maddy was (23 C. 2. in B. R.) indicted for murder, and the jury found a ſpecial verdict; "that he coming "into

latter, though it ſavour more of ſudden revenge, than of ſelf-preſervation, ought to be ſo *a fortiori*; for adultery is the higheſt invaſion of property. The Athenians[1] comprehended both theſe caſes in the ſame law, and permitted no degree of puniſhment in either

into his houſe, found the deceaſed in the act of adultery with his wife, and immediately ſtruck him with a joint ſtool on the head, ſo that he died; they alſo found that there was no precedent malice, and the court were all of opinion that it was but man-ſlaughter, the provocation being exceeding great; and the Executioner was directed to burn him gently." But Twiſden remembered a caſe, in which the priſoner, being informed of the adulterer's familiarity with his wife, ſaid, that he would be revenged on him, and afterwards, finding him in the act, killed him, *which was held by Jones to be murder.*

Ventris. 1. 159. Raymond 212.

[1] A fine comment on this Law of the Athenians may be found in the Oration of Demoſthenes, Κατα Αριστοκρατους.

The Athenians not only gave the conſtruction of juſtifiable homicide to the death of the adulterer; the injured huſband was, by another law, permitted to exerciſe his vengeance in whatever manner he might prefer. "Si quis "adulterum in ipſa turpitudine deprehenderit, de eo, quod "libueret, ſtatuito.

Necat hic ferro, ſecat ille cruentis
Verberibus, quoſdam moechos et mugilis intrat. Juv. 10. 315.

Quem attractis pedibus patente porta
Percurrent Raphanique, mugiles que. Catull.

See Ariſtoph. Plut. v. 168.

The Roman Law in ſome degree permitted the killing of the adultereſs. Is, qui uxorem in adulterio deprehenſam occidit, humiliore loco poſitus, in exilium perpetuum dandus; in aliqua dignitate poſitus, ad tempus relegandus.

Inſt. L. 1. §. 5.

of them. If it be true, that *poſitive laws, contradictory to natural ſentiment, are cruel and dangerous*; it is an imperfection in our ſyſtem, that it hath not adopted the ſame regulation.

§. 3. The next ſpecies is Excuſable Homicide; and firſt, *per infortunium:* as when a man doing an act, not unlawful, and without a miſchievous intention, and uſing proper, that is, uſual, or ordinary circumſpection, happeneth to kill.

If however the act, on which death enſueth, be unlawful, only as *malum prohibitum*; if (for inſtance) it ſhould conſiſt in ſhooting at game without a ſtatutable qualification, it is not under that deſcription to be conſidered as an unlawful act.

Secondly, by ſelf-defence; as when a perſon, in the courſe of a ſudden and dangerous affray, which leaves no power, conſiſtently with ſecurity, to wait for the intervention of the law, retreats as far as he can with ſafety, and urged by mere neceſſity and to avoid his own death, killeth his adverſary.

This

This idea is finely expreſſed by Cicero in his oration for Milo. "*Eſt igitur, Judices, "hæc non ſcripta, ſed nata lex; quam non di- "dicimus, accepimus, legimus, verum ex naturâ "ipſâ arripuimus, hauſimus, expreſſimus: ad "quam non docti, ſed facti, non inſtituti, ſed im- "buti ſumus; ut ſi vita noſtra in aliquas in- "ſidias, ſi in vim, ſi in tela aut latronum, aut "inimicorum incidiſſet, omnis honeſta ratio eſſet "expediendæ ſalutis: ſilent enim leges inter ar- "ma; nec ſe expectari jubent, cum ei, qui ex- "pectare velit, ante injuſta pœna luenda ſit, "quam juſta repetenda.*"

But in both theſe caſes of homicide, by mere accident, and by ſelf-defence, it muſt appear, that there was no deliberation previous to the act; and even then, they are by our law [k] ſubjected to forfeitures, not only of the thing, or inſtrument, which was the immediate cauſe of the death, but of the goods or chattels of the party. The latter have long been remitted in both caſes, upon a pardon under the great ſeal, and a writ of reſtitution; and to prevent ſuch expence, in the caſe of homicide *per infortunium* it is uſual

[k] Ever ſince the ſtatute of Glouceſter. 6. Edw. 1. A.D. 1278.

for the judges to recommend a verdict of acquittal.

And here it is well obſerved [l] by Mr. Juſtice Foſter, that "Judges are miniſters, appointed by the crown for the ends of public juſtice, and ſhould have written on their hearts the ſolemn engagement of their king in his coronation oath, to *cauſe law and juſtice in mercy, to be executed in all his judgements*; that it is not therefore the part of judges to be perpetually hunting after forfeitures, where the heart is free from guilt; to heap afflictions on the head of the afflicted, and to wound a heart already wounded paſt cure." And ſurely, it may be added, that it cannot be the part of lawgivers to *permit* forfeitures in ſuch a caſe.

A great writer [m] apologizes for ſuch forfeitures, by ſuppoſing the law to ſet ſo high a value upon the life of a man, that it always *intends* ſome miſbehaviour in the perſon, who by any means takes it away; *preſuming* a faulty negligence in the caſe of miſadventure, and an unknown wrong or provocation, in

[l] Foſter pa. 264. [m] Commentaries, 4. 186.

homicide

homicide by ſelf defence. But it is difficult to conceive a mixture of criminality in mere accident, or that there can be "*neceſſitas culpabilis*," in ſelf-preſervation. The law ſhould be an indulgent parent, not an ungenerous ſtep-mother.

It is indeed the duty of law, if I may be allowed the expreſſion, to look with a very jealous eye on every action, which hath a tendency to bloodſhed; and it may by ſome perhaps be thought the wiſdom of law, to affix ſome mark of diſapprobation on every actual inſtance of bloodſhed, however caſual or blameleſs: but it is repugnant both to the duty and wiſdom of law, to ſeek any ends by the harſh and unſeemly intervention of ſubterfuges, and fictions. *The candor of legiſlation ſhould ever be inviolable.*

The true cauſe of forfeiture, in the caſes of excuſeable homicide, was well known to our Saxon, and Norman Kings; who did not ſeek any refinements of reaſoning to ſupport this very conſiderable branch of their royal revenue. They believed themſelves to poſſeſs a valuable, aſcertainable property in the lives, and limbs of their ſubjects. Fines therefore were im-

poſed in all caſes of death and mayhem, and proportioned to the degree of the perſon killed or hurt. In the earlier periods of our hiſtory, a fine or compoſition was given to the relations[n] of the deceaſed alſo. But when judges, properly ſo called, were eſtabliſhed; and when individuals had given up the right of avenging their own wrongs; the whole of this traffick was gradually transferred from private hands to the public treaſury. The innocence of the intention, ſays a law of Henry the firſt, ſhall make no difference[o] as to the compoſition; *ſive ſponte, aut non ſponte fiunt hæc, nihil æminus tamen emendetur: Quæ enim per inſcientiam peccamus, per induſtriam corrigamus.*

[n] Si mulier occidatur prægnans, et puer in eâ fuerit vivus, uterque plenâ werâ *(Vir-gelt, the price of a Man)* reddatur; ſi nondum vivus fit, dimidiâ werâ ſolvatur parentibus ex parte patris —Vide Leges Henrici 1mi. ca. 70. which contain many curious particulars on the ſubject of compoſitions.

The ſame notions prevailed among the ancient Germans; Equorum, pecorumque numero convicti multantur; pars multæ regi vel civitati, pars ipſi qui vindicatur, vel propinquis ejus exſolvitur.

[o] Yet there ſeems ſome reaſon to collect from Bracton, that, by the common law, there were no fines on death per Infortunium; except in places where a contrary uſage had particularly prevailed. Item, de iis, qui Mortui ſunt per Infortunium, nullum erit Murdrum, licet in quibuſdam partibus de conſuetudine aliter obſervetur.

de Coron. c. 15. §. 6.

Such

Such reaſoning tended to annihiliate all diſtinction between voluntary, and involuntary acts; compoſitions for crimes became as common in the courts, as compoſitions for ſins in the churches; and they were extended even to the moſt atrocious murders in the ſame manner, as to accidental deaths. Earl Godwin was adjudged by the Wittenagemot, to pay twelve handfuls of gold to Edward the confeſſor for having killed his brother; and the hundred of Boctone [p] was fined two marks for the default of a certain maid ſervant, *who was preſent*, when a horſe ſtruck a man, and killed him.

It ſeems however to be the better [q] opinion, that in the caſes of homicide *per infortunium*, or *ſe defendendo*, the forfeiture of the whole never was incurred at common law. For it was not unuſual, to pay the mulct or fine [r] in

[p] Madox Hiſt. Exchеq. ch. 14. §. 15.

[q] Foſter—pa. 287.

[r] This fine was called Murdrum.

Vice Comes reddit compotum de 10 Marcis pro uno murdro in hundredo de Hereford: et idem Vice Comes reddit compotum de 4 libris et 13 ſolidis et 5d pro uno murdro in hundredo de Feverſham.

Liulſus de Alſtredagâ reddit compotum de 200 Marcis argenti et 10 fugatoribus, et 10 accipitribus pro morte

horſes, hounds, hawks, honey, &c. and if the perſon who had committed the Homicide were too poor to pay it, or had fled, or could not be diſcovered; the Vill, wherein it was committed, or, if that were too poor, the whole hundred was ſubjected to a fine.

The ſame ideas ſeem to have prevailed in all the cotemporary governments of Europe; and the principle, on which they were founded, appears to have retained a very laſting influence in our laws.

Gamel, in theſauro 40 Marcas Argenti; et debet 160 Marcas Argenti, et 10 fugatores et 10 accipitres.

Stephanus filius Erchem-baldi reddit compotum de 10 marcis argenti pro interfectione hominis Willelmi filii Odonis.

Odo filius Alſi *debet* 60s *pro occiſione filiorum Jochi.*

Oliver de Cail and others fine pro eâdem occiſione.

I have ſelected theſe inſtances from the reign of King Stephen. See Madox, ch. 14. 6.

In the ſame ſenſe the word is uſed in the 26th ch. of the Stat. of Marlbridge. Murdrum de cætero non adjudicetur, ubi infortunium tantummodo adjudicatum eſt, ſed locum habeat murdrum de interfectis per feloniam tantum.

Fines, as a compoſition in caſes of wilful Murder, are at this day common in Mahometan countries, and are eſtabliſhed on a poſitive precept of the Koran. See B. 1. chapter of the Cow; and Chardin, voyage de Perſe, T. 2. pa. 299. If any one forgive the blood of his brother, he may purſue the malefactor for damages and intereſt; but He who ſhall injure the wicked after having received ſatisfaction, ſhall in the day of judgment ſuffer the moſt grievous torments.

" *Vita, et membra ſunt in manu regis,* ſays " Sir Edward Coke;[s] nay, the Lord of the " Villeine, for this cauſe, cannot mayheme the " Villeine, but the King ſhall puniſh him for " mayheming of his ſubject, (for that hereby he " hath diſabled him to do the King's ſervice) " by fine, ranſome, and impriſonment, until " the fine be paid." " And in my circuit in " Anno 11 Jacobi in the County of Leiceſter, " one Wright, a young, ſtrong, and luſty rogue, " to make himſelf impotent, thereby to have " more colour to beg, or to be relieved, with- " out putting himſelf to any labour, cauſed " his companion to ſtrike off his left hand, " and both of them were indicted, fined and " ranſomed therefore,[t] and that by the opi- " nion of the reſt of the Judges."

The law of Spain, far from allowing forfeitures in homicide by ſelf defence, gravely obſerves, " that[u] it is better for a man to de-

[s] Co. Litt. 127 B.

[t] By a declaration of Lewis 14th, A. D. 1677, les criminiles condamnés à ſervit ſur nos Galeres, comme forçats, leſquels aprés leurs jugemens auront mutilé ou fait mutiler leur membres ſoient punis de mort pour reparation de leur crime. Code penal, pa. 139.

[u] See the Obſerv. on the Anc. Stat. pa. 55.

" fend

" ſend himſelf, when alive, than to leave it " to others to avenge him, when he is dead."

As to homicide *per infortunium*, it is true, that it was ſubjected by the Athenians to baniſhment for a year;" but it ſhould be obſerved, that this was not in the nature of a puniſhment, but rather a protection [w] to the unfortunate perſon from the impetuoſity of revenge; for if, previous to his departure, or during his abſence, he were able to ſatisfy the relations of the deceaſed, the exile ceaſed from that moment.

And indeed, the Athenians,[x] as well as the Romans, ſeem to have formed very clear

[w] See Euripid. Oreſt. v. 511 to 518. and the Iliad, L. 23. v. 85. and Petiti Leg. Att. pa. 609. " Qui alium " caſu fortuito necaſſit, in annum deportator, *donec aliquem* " *e Cognatis occiſi placaſſit*, revertitor vero peractis ſacris et " luſtrationibus."

A full comment on this Law may be found in the latter part of the Oration of Demoſthenes againſt Nauſimachus.

[x] The ingenious writer of the " Hiſtorical Law Tracts" ſeems (pa. 33.) rather inadvertently to have made a different aſſertion. The words of Solon's Law are very remarkable, φονε και τραυματος εκ προνοιας. Again, the puniſhment of death was annexed to *wilful* murder, Τον εκ προνοιας αποκτιναντα θανατω ζημιουσθαι. — And if the Murderer withdrew before conviction into baniſhment, he was ſubjected to a total forfeiture; but the other inſtances of homicide were not liable either to corporal puniſhment or forfeiture.

The

diſtinctions upon the different inſtances of homicide.

§. 4. The Engliſh law deſcribes a third ſpecies of homicide under the name of Manſlaughter. This, though in the firſt inſtance within the benefit of clergy, is made highly criminal, and felonious; and the offender ſhall be burnt in the hand, and forfeit all his goods and chattels. And if for any previous felony, as for ſending live ſheep out of the realm, or for harbouring offenders againſt the law of cuſtoms, or for having ſolemnized a clandeſtine marriage, or for any other fact of the moſt foreign nature, he ſhould have uſed his plea of clergy, *not being a clergyman*, he is then in the firſt inſtance of manſlaughter ſubjected to the pains of death.

I have ſtated the puniſhment previous to the definition of the offence; becauſe many

The Roman Law proceeded expreſsly on the ſame principles; *In Maleficiis voluntas ſpectatur.* And Hadrian declared by Reſcript "Eum, qui hominem occidit, ſi non "occidendi animo hoc admiſit, abſolvi poſſe: leniendam "poenam ejus, qui in rixâ, caſu magis quam voluntate "homicidium admiſit."—And by another Reſcript of one of the Emperors: Infans vel furioſus, ſi hominem occiderint, lege Cornelià non tenentur: *cum alterum innocentia conſilii tuetur, alterum fati infelicitas excuſat.*

moſt

moſt ingenious, and learned writers have on this ſubject, as on many others, expatiated with more liberality than reaſon, on the merciful diſpoſition of the Engliſh government; as if it were their object rather to write the panegyric, than to make known the imperfections of the conſtitution.

We are told,[y] "that the benignity of our "law imputeth manſlaughter to an infirmity, "which is incident to the human frame;" yet manſlaughter is a capital offence. We are told,[z] "that our law pays ſuch reſpect to "human frailty, as not to put a haſty, and a "deliberate act upon the ſame level of Guilt;" yet it will appear, that both manſlaughter and murder may be committed, without any intent to do perſonal miſchief, and without any mixture of deliberation whatever.

Manſlaughter is agreed to be, the killing of another without malice, expreſs, or implied; either voluntarily, upon a ſudden heat; or involuntarily, in the commiſſion of an unlawful act.

[y] Foſter, pa. 290. [z] Commentaries 4. 191.

Voluntary

Voluntary manſlaughter, (which being an act of homicide without either a legal, or a perſonal neceſſity, is therefore neither juſtifiable nor excuſable,) enſueth moſt frequently upon ſome provocation given, or ſuppoſed to be given. But words of reproach, and contemptuous geſtures are in no caſe ſufficient to free the party killing from the guilt of murder; *unleſs* the killing be in conſequence of a blow given in a manner, and with a weapon, not likely to kill;[a] or unleſs, upon the immediate quarrel of the parties, they proceed to blows or fighting; ſo as to make the whole tranſaction one continued act of paſſion or ſudden affray, in which no undue advantage is taken on either ſide.

There muſt be ſome actual aſſault upon the perſon killing, to ſoften, what would otherwiſe be an act of murder, into manſlaughter. But even this indulgence is confined to that ſudden impulſe of paſſion, which is ſuppoſed to be irreſiſtible; *for, if there ſhould appear to have been a ſufficient interval for the voice of reaſon to be once heard,* the act of homicide will then be attributed to the malignant principle of de-

[a] Hale, 473.—Keyl, 130 to 133.

liberate

liberate revenge, and will receive the name, and puniſhment of murder.

Involuntary manſlaughter happeneth in the caſe of accidental death, enſuing upon an act unlawful, as *malum in ſe*, but in the nature only of a treſpaſs. But, if the homicide be in conſequence of an act felonious in itſelf, or in proſecution of a felonious intent, it will be murder.

It is not difficult to illuſtrate this diſtinction by an example; though I purpoſely avoid any mention of adjudged precedents, that I may not be led into a long, and weariſome labyrinth of facts. It is extremely dangerous to give any extract from caſes of homicide, where "*every circumſtance weigheth ſomething in the "ſcale of juſtice*," and where imperfect reports have the moſt fatal tendency.

A man ſhooting at a bird, and uſing proper and ordinary caution to prevent danger, unfortunately happeneth to kill his neighbour. The guilt of this man in the eye of our law, and conſequently the proportion of his puniſhment, will depend partly on the nature, ſhape, and ſize of the bird; and partly on the intention

tion of the man with reſpect to the bird; but will have no connection whatever with the act of homicide.

If the bird chanceth in evidence to prove a wild pigeon,[b] *feræ naturæ et nullius in bonis*, it will be excuſable homicide; if a tame fowl, and ſhot at for the amuſement, or improvement of the markſman, it will be felonious, and manſlaughter, becauſe an unlawful treſpaſs on the property of another; laſtly, if the bird were private property and intended to be ſtolen, which muſt be collected from the circumſtances, it will be murder, by reaſon of that felonious intent.[c]

Such on this point is the doctrine of our law, and infinite is the variety of conſtructive crimes, which have been eſtabliſhed thereon; the inſtance, which I have ſelected, is no exaggeration.

[b] Keyl, 117,—6 State Tryals, 222.—Foſter, 258.

[c] On the ſame principle, when a man, endeavouring to kill another, and miſſing his blow, happeneth to kill himſelf; it is in judgment of our Law *wilful and deliberate ſelf-murder*. See Hale, H. P. c. 1. 413.

That

That external, unconnected [d] circumſtances ſhould regulate the nature and enormity of crimes, that the intention ſhould be transferred to the accident which reſults from it, are poſitions, which, in their preſent extent, have ever ſeemed to me moſt prepoſterous and unnatural. They bear however the venerable ſtamp of antiquity; and the errors derived from them, if indeed they be errors, are the accumulation of many centuries.

[d] In all ſuch inſtances, the intent of the priſoner which *can only* be collected from the circumſtances, is evidently and neceſſarily ſubject to the ſole determination of the Jury: "that A ſhot at the poultry of B and by accident killed a "man" would be an inſufficient verdict, on which no judgment could be given. The intent of A with regard to the poultry ought alſo to have been found. "If an action "unlawful in itſelf be done deliberately, and *with intention "of miſchief*, or great bodily harm to particulars, or of "miſchief indiſcriminately, fall it where it may, and death "enſue againſt or beſide the original intention of the party, "it will be murder. But if *ſuch miſchievous intention* doth "not appear, which *is matter of fact* and *to be collected from "circumſtances*, and the act was done heedleſsly and incau-"tiouſly it will be manſlaughter: not accidental death, "becauſe the act upon which death enſued was unlawful."

But quere, How this can be reconciled with another paſſage in the ſame book which ſaith, *that the court, and not the jury, is to judge the malus animus, which is to be collected from all circumſtances*, and bringeth the offence within the denomination of wilful malicious murder, whatever might be the immediate motive to it.

Foſter, pa. 261. and pa. 257.

I proceed

I proceed therefore with diffident and trembling ſteps on this hitherto untrodden ground; fearful, though in the purſuit of truth and the defence of natural rights, of wandering into the mazes of abſurdity, or ſtriking at the fundamental principles of Government.

It is true, that crimes are to be eſtimated, in ſome degee, by the actual miſchief done to ſociety; becauſe the internal malignity of mankind is not within the cognizance of human tribunals.

But if this poſition were received in its fulleſt latitude, it would prove too much; it would prove that every act of homicide is equally criminal, and that the intention is in no caſe to be conſidered. The following reſtriction ſhould then be obſerved, as inviolably connected with the principle. *Every member of ſociety hath a right to do any act without the apprehenſion of other Inconveniences, than thoſe which are the proper conſequences of the act itſelf*; for it is the right of every member of ſociety to know, not only when he is criminal, but in what degree he is ſo. This is the great boundary of political liberty; which gives way to inſecurity and

danger, whenever the arbitary inferences of magiſtracy are admitted into its confines. Can it be ſaid, conſiſtently with this principle, that the caſual conſequence of an intended larceny ſhall be liable to receive the appellation and puniſhment of wilful murder? This may be reconciled to the philoſophy of ſlaves; but it is ſurely repugnant to that noble, and active confidence, which a free people ought to poſſeſs in the laws of their conſtitution, the rule of their actions.

Yet there are ſome caſes, in which it may be reaſonable to carry over the felonious intent to commit one act, to a different act enſuing in proſecution thereof. As when a portion[e] is given to the mother to deſtroy the child of which ſhe is pregnant, and it kills the mother; this is murder, and hath been ſo adjudged. In like manner, "if a man lay "poiſon with an intent that B ſhould take it, "and C by miſtake takes it, and is poiſoned "to death; this is murder, though it were "not intended for [f]him." "So, when a man

[e] By Sir M. Hale at Bury, A. D. 1670.—Hale's Hiſt. P. C. 1. 429.

[f] See Agnes Gore's caſe, Plowden, 474.—and Hale's Hiſt. P. C. 1. 431.

"intending

" intending to burn one houſe, in execution " thereof happens to burn another houſe; " this is a malicious and felonious burning, " for it ſprings out of a malicious and feloni- " ous [z] intent." *But* in all theſe caſes it ſhould be obſerved, that the conſequence participates the nature of the original crime, and that the general malice of the intention is followed by a fact of the ſame degree and kind.

When it was ſaid, that involuntary manſlaughter happens in the caſe of accidental death enſuing upon unlawful acts; I ought to have added, that acts lawful in themſelves, but done without due care and circumſpection, are to be conſidered as unlawful, and even as felonious in their conſtruction, if done with a negligence ſo notorious, as to imply malice againſt all mankind. And on this diſtinction, a killing, in conſequence of a piece of timber or ſtone thrown from the top of a houſe into the ſtreet, is always cited in our books as an inſtance of homicide, which may be miſadventure, manſlaughter, or murder, according to the circumſtances of the caſe.

[z] State Trials 6. 222.— Co. P. C. pa. 67.—and 3 Inſt. pa. 67. " *the Event ſhall be coupled to the Cauſe.*"

§. 5. The offence of mortally ſtabbing another upon ſudden provocation, not then having a weapon drawn, nor having firſt ſtricken at the party killing, is a peculiar ſpecies of manſlaughter, which is puniſhed as murder by a ſtatute made in the firſt year of James the firſt, upon a ſpecial occaſion—"The offence (ſays Lord Raymond) conſiſted "in the manner of doing it, becauſe the "Scots carried ſhort daggers, and frequently, "upon differences ariſing at table, ſtabbed "others unprovided."

The particular grievance between the nations hath long expired; and the particular remedy provided for it ought not to have ſurvived.

The ingenuity and benignity of the judges have gone hand in hand in the conſtruction, and mitigation of this ſtatute;[h] yet it hath proved fatal to many unfortunate perſons, who

[h] Of this the following ſolemn determination in the caſe of Page and Harwood is a curious inſtance "Though in judgment of law every one preſent, and aiding, is a principal; yet in the conſtruction of this ſtatute, which is ſo penal, it ſhall be extended *only to ſuch as really and actually made the thruſt; not to thoſe who in conſtruction of law only may be ſaid to make it.*" 1 Hale, 468.—Allen, 43.—Stiles, 86.

have

have ſuffered, not merely becauſe they had killed, but becauſe they had adopted a mode of killing, to which the law expreſſes a partial antipathy.

§. 6. The diffuſe manner, in which I have now conſidered the inferior inſtances of homicide, hath almoſt exhauſted the ſubject; and it might perhaps be ſufficient to add, that every remaining inſtance amounts to the crime of murder,[1] that crime at which our nature ſhudders.

Murder is the killing of another with malice afore-thought, either expreſs, or implied.

The act then is not complete without the death of the party; but if the party ſhould not die ſpeedily after the blow, yet if he die within a year, and a day, and if the wound be the ultimate, though not the immediate cauſe of death, it is murder.

And ſuch murder is not confined to direct attacks upon life, but may be the conſequence of indeciſive acts, or wilful neglects, or cru-

[1] Commentaries, 4. 194.

elties, from which death was likely to enſue. This was the caſe of the woman, who left her infant in an orchard covered only with leaves, in which condition it was ſtruck by a kite, and died.

Expreſs malice is that deliberate intention to take away the life of a fellow creature, which is manifeſted by external circumſtances, capable of proof. It has indeed been extended to that head of conſtructions, which I have already mentioned. As when two or more meet together to do an unlawful act, the probable conſequence of which may be blood-ſhed, and one of them kills a man, ſuch killing is adjudged to involve the whole company in the guilt of murder, they being preſumed to have proceeded on a general and malicious reſolution againſt all oppoſers. The fact however muſt appear to have been committed ſtrictly in proſecution of the purpoſe, for which the party was aſſembled; and this diſtinction probably governed the caſe of Lord Dacres,[k] in which indeed there is an apparent hardſhip. The park-keeper was killed without his knowledge, and far out of his ſight,

[k] 1, Hale's Hiſt. P. C. 534. Moore, 86. Foſter, 354.

and

and hearing; yet in the eye of the law he was preſent, being at that inſtant engaged, though in a different part of the park, in the encouragement, protection, and ſupport of the common enterprize.

Implied malice is that inference which ariſes from the nature of the act, though no particular malice can be proved. As when a man ſuddenly kills another without any apparent provocation; when he gives poiſon to another without any known inducement; when he wilfully ſuffers a beaſt notoriouſly miſchievous to wander abroad, and it kills a man. The laſt inſtance is certainly a moſt groſs miſdemeanour; and Lord Hale thinks it murder, as by the Jewiſh law,[1] and mentions a report of a perſon being actually executed thereon.

A peculiar protection is, in conſtruction of law, given to miniſters of juſtice executing the ordinary proceſs; and alſo to private perſons

[1] Exodus 21. 29. But if the ox were wont to puſh with his horn in time paſt, and it hath been teſtified to the owner, and he hath not kept him in, but that he hath killed a man or a woman, the ox ſhall be ſtoned, and his owner alſo ſhall be put to death.

endeavouring in certain caſes to arreſt or impriſon: the killing of ſuch perſons, though in the exertion of perſonal violence is homicide committed in defiance of the juſtice of the kingdom, and is therefore deemed murder of malice prepenſe.

And here it hath been much debated, how far acts of oppreſſion towards individuals may authorize them, or the bye-ſtanders, in their behalf, to attempt a reſcue; and how far the party, whoſe perſon or property is invaded under colour of law and juſtice, or others inpoſing in his defence and committing homicide, may be thought to have acted on a provocation ſufficient to acquit them of the guilt of murder.

The juſtification of reſiſtance to magiſtracy, attended with ſuch conſequences, muſt principally depend on the circumſtances of each particular caſe; and ſuch reſiſtance is generally founded, rather in deliberate intention, than in the venial infirmity of paſſion.

Yet a worthy Judge [m] ſeems to have made an unpleaſing diſtinction on this ſubject, be-

[m] Foſter, 316.

tween

tween the ſtability of government, and the private rights of the people. "Let us (ſays "he) ſuppoſe the caſe of an upright and de- "ſerving man, univerſally beloved, and eſ- "teemed, ſtanding at the place of execution "under a ſentence of death, *manifeſtly unjuſt*. "This is a caſe, that may well rouſe the in- "dignation, and excite the compaſſion of the "wiſeſt and beſt of men: but wiſe, and good "men know,[n] that it is the duty of private "ſubjects to leave the innocent man to his "lot, how hard ſoever it may be, without "attempting a reſcue; for otherwiſe, all go- "vernment would be unhinged."

The ſtating of the caſe now before us ſuppoſes abſolute certainty as to the injury, and excludes all poſſibility of popular miſconception. It is difficult to perſuade oneſelf, that in ſuch a caſe the reſiſtance of the bye-ſtanders would be unjuſtifiable.

Drunkenneſs, voluntarily contracted, though it be a temporary frenzy, is no excuſe for murder in the law of England; which pro-

[n] Socrates carried this idea to a great Extreme, when, doomed to death by an unjuſt ſentence, he refuſed to ſtir from his priſon, though the doors were opened to him.

ceeds

ceeds in this inſtance on an idea, that one crime ought not to be privileged by another. I have ſome where read, that a beautiful ſtatue, having killed a man by its fall, was by a ſolemn ſentence, founded on a law of Draco, thrown into the ſea. The Roman law ſhews great indulgence on this ſubject, "*per vinum* "*delapſis capitalis poena* ° *remittitur.*"

§. 7. The crime of taking away the life of another by falſe teſtimony, deliberately given, ought not to paſs unnoticed. It is in its nature a moſt malignant ſpecies of aſſaſſination, contaminating with blood the ſacred ſtream of juſtice, and fatal to the lives, properties, and honors of the innocent.

By the laws of Egypt perjury in general was capital;[p] for it was ſaid to involve the two greateſt crimes, viz. Impiety to the Gods, and violation of faith, and truth to man.

At Rome it was alſo a capital crime, but properly confined to thoſe "*qui falſum teſtimo-* "*nium dolo dixerint, quo quis publico judicio rei* "*capitalis damnaretur.*"[q]

° Ff. 49. 16. 6. [p] Diodorus Siculus, L. 1. c. 6.
[q] Dig. L. 48. T. 8. §. 1.

In

In like manner, it is puniſhed with death in France, and with good reaſon; for in France the perſon accuſed[r] is not permitted to produce witneſſes in his defence, and his doom depends ſolely on the veracity of thoſe, who give teſtimony on the part of the public.

This circumſtances brings credit to the aſſertion of our ancient writers,[s] that perjury was capitally puniſhed by the common law. A milder doctrine however hath long prevailed; partly from an apprehenſion, that ſuch ſeverity might tend to intimidate witneſſes, who would often be induced[t] to ſtifle their teſtimony, if it muſt be given at the peril of their lives; partly in conſideration of the nature of our trials, which furniſh the accuſed with a variety of reſources; inaſmuch as truth and mercy are admitted to combat falſhood and malevolence, and the whole examination is rather in the nature of a diſcuſſion between the parties, than of a proſecution againſt an undefended, oppreſſed individual.

[r] L'Eſprit des Loix, L. 29. c. 11.

[s] Mirror, c. 1. §. 9. Brit. c. 5. Bracton, L. 3. c. 4. contra, Mr. Juſtice Foſter, p. 132.

[t] Commentaries, 4. 197.

Falſe

Falſe teſtimony is at preſent puniſhed capitally in Scotland; but this ſeverity doth not appear to be warranted either by ancient cuſtom or by ſtatute, but rather to have been aſſumed upon the indignation of the people againſt an offence ſo prejudicial to ſociety.

§. 8. There is another ſpecies of murder of moſt aggravated malignity, and known in our law by the name of petty treaſon; becauſe it is a breach of that allegiance, which the murderer oweth to the deceaſed, when the fact is committed.[u]

Petit treaſon in our law differs widely from other inſtances of murder, in certain privileges given to the defendant; ſuch are the power of a peremptory challenge of thirty-five jurors, and the requiſition of two witneſſes[x] to the indictment, and at the trial.

[u] In England women (from a regard to decency ſay our Books) are burnt alive for the crimes both of high and petty treaſon. In Ruſſia for the murder of their huſbands they ſuffer a ſort of death, leſs terrible perhaps in idea, but certainly more painful to ſenſe.

"Les femmes, qu'on enterroit toutes vives juſquer aux "epaules, pour avoir tuè leur maris, vivoienot pluſieurs "jours dans cette derniere ſituation."

Voyage en Siberie d'Auteroche.

[x] Yet it is thought, as petty treaſon comprehends murder, that, if two witneſſes cannot be produced at the trial, the evidence

It is certainly true, that *the credibility of a witneſs, or, in other words, the probability of the atteſted fact, decreaſes in proportion to the aggravated atrociouſneſs of the charge.* Cicero was aware of this principle, and made a fine application of it to the crime of parricide.

" *Extent oportet expreſſa ſceleris veſtigia,*
" *ubi, quâ ratione, per quos, quo tempore,*
" *maleficium ſit admiſſum. Quæ niſi multa et*
" *manifeſta ſunt, profecto res tam ſceleſta, tam*
" *atroix, tam nefaria credi non pateſt: pene*
" *dicam, reſperſas manus ſanguine paterno*
" *judices videant, oportet, ſi tantum facinus,*
" *tam immane, tam acerbum ſint crediturі.*
" *Magna eſt enim vis hnmanitatis, multum*
" *valet communis ſanguinis: reclamitat iſtiuſ-*
" *modi ſuſpicionibus ipſa natura: portentum*
" *atque monſtrum certiſſimum, eſſe aliquem hu-*
" *manâ ſpecie et figurâ, qui tantum immanitate*
" *beſtias vicerit, ut propter quos hanc ſuaviſ-*
" *ſimam lucem aſpexerit, eos indigniſſime luce*
" *privarit!*[y]"

evidence of one may be ſubmitted to the jury, who may thereupon find the defendant guilty of the murder, and acquit him of the treaſon.

Foſter, 328. Contra, 2. Hawk. 258. §. 144.

[y] Orat. pro Sex. Roſc. Amerins, ca. 22.

I am

I am ſorry to add, that parricide is not comprehended within the claſs of petit treaſon, nor ſubjected by our laws to any degree of exemplary notice. Reiterated experience hath given a melancholy refutation to Solon's idea, "that it is impoſſible to commit ſo un-"natural a barbarity."

This chapter ought not to be diſmiſſed without notice being taken of a rule eſtabliſhed by Sir Matthew Hale, relative to trials in caſes of murder; "I would never (ſays he) "convict any perſon of murder, or man-"ſlaughter, unleſs the fact were proved to be "done, or at leaſt the body found." He then mentions two extraordinary caſes, which ſhew this rule to be founded both in humanity and Wiſdom; and we find the ſame maxim in the Roman law. *Item illud ſciendum eſt, niſi conſtet aliquem eſſe occiſum, non haberi de familiá quæſtionem.*[z]

The proper judgment againſt deliberate murder, is death; and in the rigid infliction of this judgment both the ſafety and morality of mankind are greatly intereſted. "Whoſo

[z] Dig. L. 29. T. 5. §. 24.

"ſheddeth

" ſheddeth man's blood, by man ſhall his " blood be ſhed," ſaith the Moſaical law; and therefore " Ye ſhall take no ſatisfaction " for the life of a murderer, which is guilty " of death; but he ſhall ſurely be put to " death, ſo ye ſhall not pollute the land " wherein ye are."

CHAP. XX.

Of Duelling.

§. 1. THE law of England hath aſſigned the puniſhment of murderers to Dueliſts and their Seconds;* and in this it is ſupported by the laws of Religion and Mo-

* It is very certain, that, in caſes of Duelling in cold blood, or when there hath been a ſufficient interval for the paſſions to ſubſide, the principal and his ſecond, if homicide ſhould enſue, are in our Law, both guilty of Murder. Some able writers have holden, that the ſecond of the perſon killed is equally guilty, in reſpect of that aid, and countenance, which he gives to the principals in the execution of their mutual purpoſe; but it ſeems (ſays Serjeant Hawkins) too ſevere a conſtruction to make a man by ſuch reaſoning the murderer of his friend, to whom he was ſo far from intending any miſchief, that he was ready to hazard his own life in the quarrel.

1. Hale, 443. 1. Hawk. 82. Dalt. c. 93.

The reaſoning faculties of men vary as much as their faces: it hath been impoſſible therefore for the law to fix any

rality. But this crime, though prohibited by the legiſlature under pain of death and the laſting conſequences of an Attainder, is unhappily enjoined by the prejudices of mankind, and the fallible voice of popular eſtimation; and when ſhame is the conſequence of obedience to law, the ſword of Juſtice loſes its terrors. Hence the Duelliſt kills his friend, whom he loves;[b] and the Judge condemns the Duelliſt, whilſt he ſcarcely knows how in his own heart to diſapprove his behaviour.

It is in vain to ſay, that this unhappy cuſtom might be deſtroyed by puniſhing the aggreſſor, who firſt gives the affront; for the affront is often indeſcribable.

any time in which the paſſions ſhall be ſuppoſed to be cool; this muſt depend on the circumſtances of deliberation to be given in evidence; and in many caſes it hath been adjudged, that death in conſequence of an appointment and meeting a few hours ſubſequent to the provocation is murder.

See Legg's ca. Kelyng, 27.

There is a degree of hardſhip in the caſe of John Barbot, who was executed at the Iſland of St. Chriſtopher, A. D. 1753, 10 State Trials, p. 182. But I have not found any caſe of an actual execution *in England*, in conſequence of a duel *fairly fought*. There were not however any ſuſpicions of a contrary kind in the caſe of Major Oneby, who would certainly have been executed, if he had not killed himſelf the night before. See Lord Raymond, p. 1485.

[b] Spectator, No. 84. Rouſſeau la nouv. Heloiſe, T. 1.

The

The inflíction of extreme penalties on the act without regard to its conſequences might be more effectual; but is it not to be feared, that the propenſity of our natures to revenge would ſubſtitute the more fatal, and more odious practice of aſſaſſination? I ſhall be anſwered perhaps, that the ſword and the ſtilletto were equally unknown both at Rome and at Athens; but it ſhould be remembered, that ſoftneſs and refinement of manners were alſo unknown there.[c]

Of little avail is it to object, that true honor depends not on the prejudices of the people, but hath its ſource in the heart; that it is more courageous to reſiſt the abſurd tyranny of cuſtom, than to ſubmit to it; that the defence of honor is not placed in occaſional ap-

[c] Gallantry, as well as Duelling, is of modern invention, and it is very obſervable, that they have been concominants in their progreſs. The intercourſe of the ſexes hath been the ſchool of manners: and there even ſeems reaſon to ſuſpect that our fantaſtic notions of honor, are derived from the influence of female ſenſibility. One of the courtiers of William the 3d expreſſed this idea very naturally, when being aſked by his friends, why one of his eſtabliſhed character for courage and good ſenſe, would anſwer the challenge of a coxcomb; he confeſſed, "that for his *own* ſex, he could ſafely truſt their judgement: but how ſhould he appear at night before the maids of Honour?

See Shaftesbury adv. to an author.

peals to the ſword and piſtol, but in a life of integrity and virtue; that when a fencing ſchool is made the court of juſtice, there is no law but violence, no argument but murder; that reputation is not cleared by cutting the throat of the calumniator; that there is no affinity between the manner of juſtifying, and a real juſtification; that benevolence is the baſis of every virtue, and that *it is the frenzy of faſhion which tempts us to decide petty animoſities by the hazard of eternity*; all theſe aſſertions may be true; but the moſt ſolid reaſoning is received as mere declamation, when oppoſed to the impetuoſity of paſſion, or the fear of ſhame.

CHAP. XXI.

Of Suicide.

PRoxima deinde tenent moeſti loca, qui ſibi Lethum
Inſontes peperere manu, lucemque peroſi
Projecere animas.[a]

The beſt argument of the ancient writers againſt ſuicide is to be found in Plato's Phædo,

[a] Æn. L 6.

in

in a part of the dialogue between Socrates and Cebes. The philoſopher indeed had no occaſion to exert his abilities on the oppoſite ſide of the queſtion, for he lived in hourly expectation of the executioner. "*Illa tanquam cycnea vox divini* * *Hominis*" had no effect on Cato, who is ſaid to have given a repeated reading to theſe ſpeculations on the very night that he deſtroyed himſelf. Robeck wrote a voluminous, and diſpaſſionate apology for ſuicide, and when he had finiſhed his book, put a period to his own exiſtence. Numerous alſo are the inſtances, credibly atteſted, of men, whoſe conduct in every other reſpect hath been blameleſs, who have quitted life, upon the ſuppoſed conviction of cool and deliberate reaſoning. When all the ties, ſay they, of ſentiment and affection, which attach the heart to this world, are by a variety of misfortunes diſſolved, or forced aſunder, the idea is obvious; when exiſtence becomes a burden, death is the reſting place of nature.

Such is the argument of thoſe gloomy ſophiſts, who loſe ſight of the final object of their exiſtence; who forget, that they are not created merely to exiſt, to ſuffer, and to die;

* Cic. Orator.

and are weak enough to place a few years of miſery in competition with immortality.

Such men are deaf to the voice of God; it cannot be expected, that they will liſten to the comparative inſignificance of human edicts. Temporary conſiderations have no weight with thoſe, to whom the proſpect of eternity is become a ſubject of indifference.

The confiſcation therefore of property, inflicted by many governments on the crime of Suicide, is ineffectual and abſurd. It is cruel alſo and unjuſt thus to heap ſufferings on the head of innocence, by puniſhing the Child for the loſs of its parent, or aggravating the diſtreſs of the widow, becauſe ſhe hath been deſerted by her huſband.

The ignominious burial of the ſelf-murderer is not liable to ſuch exceptions; *valeat, quantum valere poteſt.* Plutarch tells us, that the virgins of Miletum, being ſeized with an Epidemic inclination to hang themſelves, perſiſted in that practice with great alacrity; till the magiſtrates ordered the bodies of all, who were found hanging, to be dragged naked by the ſame rope round all the ſtreets of the city.

He

He adds, that it proved a very effectual remedy.[f]

Tiberius is ſaid to have given encouragement to criminals, to become their own executioners. *Damnati, publicatis bonis, ſepulturâ prohibebantur: eorum, qui de ſe ſtatuebant, humabantur Corpora, manebant teſtamenta, pretium feſtinandi.*——Tacit. Annal. L. 6.

CHAP. XXII.

Of other Crimes relative to the Perſons of Individuals.

INJURIES and abuſes, which relate to the perſons of private ſubjects, are properly liable to penal laws; for in their example and tendency they are dangerous to the public morality, and ſubverſive of the political rules of right.

[f] Le Parlement de Paris condamne les cadavres des Homicides d' euxmémes, à être träinés ſur une claie, conduits à la voirie, enſuites pendus par les pieds et leur bien confiſqués. Code penal pa. 140.

§. 1. By the ancient law of England, and I believe, by the cotemporary laws of all Europe, the offence of maiming was puniſhed by the rule of retaliation, an eye for an eye, a tooth for a tooth.[s] " *Mes, ſi la pleynte ſoit* " *faite de femme qu' avera tollet a home ſes* " *membres, en tiel caſe perdra la feme la une* " *meyn par jugement, come le membre dount* " *ele avera treſpaſſé.*" We find the ſame inſtitution in the law of the twelve tables, " *Si-* " *quis membram rupit, ni cum eo pacit, talio* " *eſto*" The obſervations made on this ſubject by one of the diſputants in Aulius Gellius are curious and deciſive. " *Præter enim ulſciendi* " *acerbitatem ne procedere quoque exſecutio juſta* " *talionis poteſt, quod enim per imprudentiam* " *factum eſt, retaliari per imprudentiam debet.* " *Sed ſi et prudens ruperit, nequaquam patietur* " *altius ſe lædi, aut latius, quod cujuſmodi libra* " *atque menſura caveri poſſit, non reperio; quin* " *etiam ſi quid plus erit, aliterve commiſſum,* " *res fiet ridiculæ atrocitatis, ut contraria actio* " *mutuæ talionis oriatur, et adoleſcat infinita* " *quædam reciprocatio talionum.*"

[s] Diodorus Siculus relates a curious caſe which happened in conſequence of a law made by Charondas to the ſame effect. L. 12. Ch. 17.

This

This barbarous mode of puniſhment, with the pecuniary compenſations which attended it, having gradually fallen into diſuſe, Mayhems became puniſhable by fines and impriſonment; and ſo continued till the 5th H. 4th ca. 5. which made it felony to cut out the tongue, or put out the eyes of any of the king's ſubjects, of malice prepenſe. "The "miſchief (ſays[h] Sir Edward Coke) before "this ſtatute was; that when one had been "beaten, wounded, maimed, or robbed; the "miſdoers, to the end that the party grieved "might not be able to accuſe them, did cut "out their tongues, or put out their eyes, pre-"tending the ſame to be no felony."

But the great ſtatute on this ſubject, at preſent in force, is the 22d and 23d of Charles 2d, ch. 1. which enacts, that any perſon, who by lying in wait, *ſhall ſlit the noſe*, or cut off or diſable any limb, or member of any ſubject of his majeſty, with intent in ſo doing to maim or diſfigure, ſhall ſuffer death without benefit of clergy.

I have ſpecified this particular proviſion in favor of the noſe, for the ſake of an obſerva-

[h] 3. Inſt. p. 62.

tion. The caſe of Sir John Coventry deſerved great indignation; but *lawgivers ought not, in conſequence of a particular enormity, to neglect the uniform diſpenſation of juſtice.* The ſtatute book is not the proper repoſitory of hiſtorical facts. [i]

As to the general purport of the act; the offences deſcribed are certainly heinous, and the penalty, though in the extreme of ſeverity, is perhaps not diſproportionate to the audacioufneſs of the Crime.

§. 2. "The crime of wilfully and malici-"ouſly ſhooting at any perſon" is alſo made capital, [k] though neither death nor maim ſhould enſue.

It is of dangerous conſequence to make the attempt to commit a crime, and the actual perpetration of it, equally penal. An aſſault in any other manner, with intent either to maim or murder, is conſidered only as a miſdemeanor; and it deſerves obſervation, that *the wording of this proviſion, though directed*

[i] See the preamble to the 9th Ann. c. 16. relative to the perſons of privy counſellors.

[k] 9. Geo. 1ſt. ch. 22d.

againſt

againſt an enormity of a local, and very different nature, comprehends the caſe of duelling without piſtols.

Premeditated aſſaſſination is capitally puniſhed by the law of France,[1] though it ſhould reſt only in the intent, and not be followed by any actual homicide.

§. 3. The forcible abduction and marriage of women deſerves, in all ſtates, a ſevere animadverſion; and it is made a capital felony in our law, if done for lucre; or if the woman had ſubſtance in money or lands, or be heir apparent to her anceſtors. Theſe hypothetical proviſions are liable to exception; but it is unneceſſary: for the marriage act hath at leaſt had one good effect, in making this offence extremely difficult to be committed.

§. 4. The forcible taking, and the decoying by falſe pretences, any man, woman, or child, from their own country, and ſelling them into another, ſeems to be one of the greateſt crimes below the degree of murder, that can be committed againſt individuals. By

[1] Ordonnance criminelle de 1670. tit. 16. art. 4.

the

the Jewiſh, and by the Roman law, [m] ſuch offenders were capitally puniſhable.

It is remarkable, that in England, where the nature of our ſituation and commerce makes this crime eaſy to be committed; and where the freedom of our conſtitution makes it peculiarly offenſive; it is not mentioned in any ſtatute, but left as a mere miſdemeanor at the common law.

§. 5. Aſſaults, Woundings, and falſe Impriſonments, may be proſecuted in our law both as public crimes, and private wrongs. For in theſe inferior offences againſt the perſon, it hath been thought reaſonable, not only to aſſign thoſe marks of public diſapprobation, which, for the ſake of example, are due to all diſturbances and oppreſſions of a public nature, but alſo to give to the party aggrieved that private ſatisfaction, which is due to him for the mere civil injury.

On the conviction of ſuch offences by indictment, the proportion of the puniſhment depending on the circumſtances of the caſe is

[m] Exod. 21. 16. Ff. 48. 15. 1. and cod. ad legem Fabiam de plagiariis l. 9. t. 20. l. 7. & c. 16.

neceſſarily

neceſſarily left, under certain reſtrictions, to the diſcretion of the court. If therefore the proſecution appear reaſonable, it is not unuſual to recommend it to the offender, before judgment, to make a pecuniary ſatisfaction to the party injured; who thereupon releaſes his right to a civil action, and the puniſhment by the court is moderated accordingly.

This practice, which is founded in humanity to both parties, is exerciſed with the utmoſt caution, ſo as neither to leſſen the efficacy of public example, nor to multiply violent proſecutions for the ſake of private lucre. It is well obſerved however, that the exerciſe of ſuch a power "ought to be confined to judges "in the ſuperior courts of record, and ought "never to be allowed in local and inferior "juriſdictions." Above all, it ſhould never be ſuffered, where the teſtimony of the proſecutor himſelf is neceſſary to convict the defendant; for by ſuch means the rules of evidence are entirely ſubverted, the proſecutor becoming in effect a plaintiff, and being ſuffered to bear witneſs for himſelf.

[a] Commentaries, 4, 357. Beccaria c. 46.

§. 6. I

§. 6. I ſhould obſerve, that by the 9th Ann. c. 16. to aſſault, ſtrike, wound, or attempt to kill, any private counſellor in the execution of his office, is made felony without the benefit of clergy.° *It would be a good general rule, to give at firſt a temporary duration only to all new laws, which are capitally penal*; and particularly to thoſe, which are made on the ſpur of the occaſion.

§. 7. It is with much reluctance, that I undertake the mention of certain other crimes relative to the perſon, which in their nature, and tendency, are very prejudicial to the well being, morality, and ſafety of ſociety.

The crimes, to which I allude, are founded in the abuſe of that paſſion, on the due regulation of which depend the exiſtence, and much of the happineſs of mankind.

The offence of rape is ſecret in its kind, and generally confined to the knowledge of the party injured; whoſe evidence is therefore competent, becauſe frequently the only addu-

° There is another law relative to felonies againſt the king's council. 3. H. 7, c. 14.

cible

cible proof of the fact. The charge however is in moſt caſes ſupported by the collateral, and concurrent teſtimony of time, place, and circumſtances; and the mere affimative oath of the woman is rarely thought ſufficient to convict.

The well known words [p] of Sir M. Hale on this ſubject are very deſerving of attention. "It is the excellency of the trial by jury, "that they are the triers of the credit of the "witneſſes, as well as of the truth of the "fact: it is one thing, whether a witneſs be "admiſſible to be heard; another thing, "whether he is to be believed, when heard." "It muſt be remembered, that this is an "accuſation eaſy to be made, and hard to be "proved; *but harder to be defended by the "party accuſed, be he never ſo innocent.* And "we ought to be the more cautious, becauſe "the heinouſneſs of the offence many times "tranſporteth the judge, and the jury with "ſo much indignation, that they are over "haſtily carried to the conviction of the per-"ſon accuſed, by the confident teſtimony of "ſometimes falſe and malicious witneſſes."

[p] 1. Hales 634.

The

The ſame learned writer hath alſo ſaid, " that this crime ought to be ſeverely, and " impartially puniſhed with death;" and we may allow it to be one of thoſe unhappy inſtances, in which it is neceſſary to ſacrifice the life of a fellow-creature to the ſecurity of good citizens, and the peace of ſociety. But it muſt alſo be admitted, that it is a crime peculiarly liable to vary in the degree of its atrociouſneſs, according to the circumſtances of the caſe, and therefore peculiarly open to the divine prerogative of pardon.

This offence was a felony at the common law, and had a puniſhment (ſaith Sir E. Coke[q]) " under ſuch a condition, as no other felony " had the like."

The offender was adjudged *amittere oculos*, " *quibus Virginem*[r] *concupivit*; *amittere etiam*

[q] 2. Inſt. 180.—See the Myrrour ca. 4. §. de Homicide. and by the laws of Alfred " Servus ſi ſervulam ſtuprarit Virga virilis ei præciditor.

[r] Item ſequitur gravis pœna corporalis, ſed ſine amiſſione vitæ, vel membrorum, ſi raptus ſit de concubinâ legitimâ, vel aliâ quæſtum faciente ſine delectu perſonarum; *has quidem oves debet rex tueri pro pace ſuâ*; et licet meretrix fuit anteâ, tum temporis non fuit, cum nequitiæ ejus reclamando conſentire noluit. Bracton. L. 2.

" *teſticulos*

"*teſticulos, qui calorem ſtupri induxerunt.*" As good reaſons might be given for cutting off the legs and arms of the offender, as for putting out his eyes. The idea of caſtration is more obvious, but liable to two objections; it is pernicious to ſociety from the example of barbarity, and inconſiſtent with that decency, which the law always ought to preſerve.

The latter conſideration ſhould never be neglected. It was an inſtance of the wiſdom of the Emperor Theodoſius, that he aboliſhed the infamous puniſhment of women taken in adultery, then uſed at Rome; by which they were proſtituted in the public ſtreets to all comers, a Bell ringing during the execution of the ſentence.[s]

In the ancient law of England, excluſive of the puniſhment inflicted on the raviſher, his horſe, greyhound, and hawk, were alſo ſubjected to great corporal infamy; "*Equus* "*ejus ad dedecus ſuum dedecorabitur, caudâ,* "*quam propius natibus poſſit, abſciſſâ; eodem* "*modo canis leporarius dedecorabitur, et acci-* "*piter ejus perdet beccum, unques, et caudam:*"

[s] Puff. 8. 3. 27. Socrat. Hiſt. Eccl. L. 5. ch. 18.
[t] Staunford 22. B.

but

but the woman, that was raviſhed, might prevent all the penalties, if, before judgment, ſhe demanded the criminal for her huſband. The Roman law was in the ſame ſpirit; "*Rapta raptoris, aut mortem aut indotatas* "*nuptias optet*;" upon which there aroſe what was thought a doubtful caſe, *Una nocte quidam duas rapuit, altera mortem optat, altera nuptias.* In the judgment of common ſenſe the deciſion is evident.

In the conſtruction of this crime the Roman law made no diſtinction between ſeduction and force; *Sive volentibus ſive nolentibus tale facimus ſit perpetratum.*[x] In modern nations, where the intercouſe of the ſexes is

[x] The ancient Laws of England treated every ſpecies of Incontinence with great ſeverity.—Edmondus rex adulterium affici juſſit inſtar homicidii. Leg. Edm. ca. 4. Canutus rex hominem adulterum in exilium relegari juſſit, fœminam naſum et aures præcidi. Leg. Canuti ca. 6. & 50. *Vidua ſi ſe non legitime commiſcebat xxs. emendabat. puella vero xs.* Domeſday Tit. ceſtre.——It is (ſays Fleta L. 2. ca. 5.) the office of the Marſhal in time of peace to exact from every common woman found about the court four pence on her firſt apprehenſion, and to forbid her the court. On the ſecond, he is to oblige her by dureſs to abjure the court. Tertio, conſiderabitur quod amputatur illi treſſoria et quod tondeatur; quarto, amputetur illi ſuperlabium.—Sir Edward Coke cites a record, in which Edward the third commands the mayor of London to remove all ſuch women from the neighbourhood of the Carmelite brethren in Fleet-Street. And

more promiſcuous, this ſeverity would be very extenſive in its conſequences. The Engliſh law hath made force neceſſary to the crime; and it was made felony without benefit of clergy in a female reign.

There was a degree of good ſenſe in the puniſhment inflicted by the Athenian laws on the raviſhers of unmarried women; *Raptor virginis mille drachmis* (about 32l. 6s.) *mul-*

And under Hen. 8. thoſe infamous women (he adds) were not allowed chriſtian burial when dead, nor the rites of the church whilſt they lived. A. D. 1650. it was enacted by the then prevailing powers (who were certainly ill qualified for the rational, and deliberate work of legiſlation) that "if any man ſhall from and after the four and twentieth "day of June following have the carnal knowledge of the "body of any virgin, unmarried woman, or widow, every "ſuch man ſo offending and confeſſing the ſame, or being "thereof convicted by verdict upon indictment or preſent-"ment, as alſo every ſuch woman ſo offending and con-"feſſing the ſame, or being thereof convicted, as aforeſaid, "ſhall for every ſuch offence be committed to the common "Gaol, without bail or mainprize, there to continue for "the ſpace of three months: and every ſuch offence is "hereby adjudged felony, and the perſon or perſons ſo of-"fending ſhall ſuffer death, as in caſe of felony without be-"nefit of clergy." Scobell's acts and ordinances. pa. 122.

By the ſame act in the firſt inſtance adultery is made felony without benefit of clergy.

The law of Howel Dda on this ſubject was written in a milder ſpirit. "Si quis concubuerit cum ancillâ invito ejus "domino, dabit domino ejus 12 denarios pro quâlibet vice, "et cum illâ amplius non concumbet." L. 1. C. 1. §. 64.

tator;

tator; et virginem, quam vitiavit, ducito. It appears however from a paſſage in Terence, that the latter part of the law was confined to Athenian citizens.

M. *O Stulte, tu de pſaltriâ me ſomnias*
Agere. D. *Hoc peccatum in virginem eſt civem.* M. *Scio.*
D. *Ebo, Scis et patere?* M. *quidni patiar?* D. *die mihi,*
Non clamas? non inſanis? M. *Non; malim quidem.*
D. *Puer natus eſt.* M. *Di bene vortant.* D. *Virgo nihil habet.*
M. *Audivi.* D. *Et ducenda indotata eſt?* M. *Scilicet.*
D. *Quid igitur facies?* M. *Domi erit.* D. *Prob Divum fidem!*
Meretrix et mater familias unâ in domo.[y]

§. 9. The above-mentioned caution of Sir Matthew Hale is peculiarly applicable to the proof of certain other crimes, of a very deteſtable nature; the mere mention of which is diſgraceful to the human ſpecies.

The facts to which I allude are at preſent felonious, and without benefit of clergy, by 5. Eliz. ca. 17.[z] in the conſtruction of which ſtatute, *agentes et conſentientes pari poenâ plectantur*; and this agrees with the law of Mo-

[y] Ter. Adelph. 4. 7. 8. & 28.
Siquid ego erga Te imprudens peccavi, aut natum tuam,
Ut mihi ignoſcas, eamque uxorem mihi des, ut leges jubent.
Plaut. Autul. 4. 10. 62.

[z] This act revived the 25. H. 8. c. 6.

ſes,

ſes, " *Qui dormierit cum maſculo coitu fœmineo,* " *uterque operatus eſt nefas, et morte* [1] *moriatur.*"

It hath been ſuggeſted by ſome ingenious writers, that ſevere penalties affixed to the conviction of crimes, the diſcovery and proof of which may be eaſily evaded, are more likely to add fuel to the guilty flame, than to extinguiſh it.

The idea is plauſible in theory, but doth not appear to be well ſupported by experience.

It is a maxim (ſays Buſbequius) among the Turks, ſeldom to make inquiries after ſecret criminals, being unwilling to ſeek occaſion for ſcandal; the ſeverity of their laws is directed againſt open breaches of the peace of ſociety. To this may be added, that, in the hiſtories of the Turks, we read accounts of Turkiſh ſeraglios without a woman within the walls.

The profligacy of the Athenians on this ſubject is well known; and the partial reſtrictions eſtabliſhed by Solon certainly had no

[1] Levit. c. 20. v. 13.

tendency to a *forcible* extirpation of it. "*Servus* "*ingenuum puerum, ne amato, neve aſſectator*; "*qui ſecus faxit, publice quinquaginta plagarum* "*ictus illi inflinguntor.*" It was an obvious inference to the people, that the purſuit prohibited to ſlaves was proper only for citizens. Again, "*Siquis liberum atque ingenuum pue-* "*rum produxerit, dica ei ſcribitor, convictus* "*morte* [z] *multator.*" The ſeduction of any other rank was not in any degree penal.

Corn. Nepos ſays of Alcibiades, "*quod* "*ineunte adoleſcentiâ amatus eſt a multis, more* "*Græcorum:*" and that "*Laudi in Græciâ* "*ducitur adoleſcentulis, quam plurimos habere* "*amatores.*"

The Edict of one of the later Emperors on this ſubject is delivered with great energy of expreſſion. "*Quid deſideratur ubi ſexus* "*perdit locum? ubi amor quæritur nec inveni-* "*tur? ubi ſcelus eſt id, quod non proficit ſcire?* "*jubemus inſurgere leges, armari jura gladio* "*ultore, ut exquiſitis pœnis ſubdantur infames,* "*qui ſunt, vel qui futuri ſunt,* [a] *rei.*"

[z] See Petit Leg. Att.

[a] Cod. 9. 9. 31. See alſo Nov. 141. T. 24. "de his "qui *luxuriantur* contra naturam. Apud Gothos caſtraban-"tur." Leg. 8. Weſtg. L. 3. 25. This crime is called by

§. 9. I ought to have obſerved, that the Engliſh law deſcribes this offence as commiſſible "with Man or Beaſt;" under the latter part of the expreſſion many perſons have ſuffered death.

The unavoidable, and general deteſtation of mankind will always be a ſtrong barrier againſt ſo horrid a crime; but it may be a queſtion, whether the public proſecution thereof be founded in wiſdom. Some have thought it unſafe, and likely rather to ſollicit the attention, than to deter from the crime. *Sapienter feciſſe dicitur Solon cum de eo nihil*

by the myrrour "une peche mortelle encontre le roye, le "ciel, que cry vengeance, et que pluis eſt horrible, que por-"giſer mere." pa. 252.—There is a very indelicate profuſion of learning on this ſubject in Mr. J. Forteſcue Alands report of the caſe of Wiſeman, who was tried and convicted de hoc crimine cum puellâ. A very learned perſon is there ſaid, to have thought the peculiar circumſtance of the caſe a great aggravation of the crime, "For it ſeems (ſaid "his Lordſhip) a more direct affront to the author of na-"ture, and a more inſolent expreſſion of contempt to his "wiſdom, condemning the proviſion made by him, and de-"fying both it and him." Forteſcue's Rep. p. 93.

Nefando non naturalis impudicitiæ crimine qui damnatur, in rogum ardentem impoſitus flammis abſumitor.

Jura Danica. L. 6. ca. 13.

Meſſrs. Bruneau le noir, et Jean Diot convaincus de ce crime ont ete brulés en place de Gréve le lundi, 6 juillet. 1750. Code penal 238.

ſanxerit,

ſanxerit, quod antea commiſſum non erat, ne non tam prohibere, quam admonere [b] *videatur:* " *præterea* [c] *videmus ea ſæpe committi, quæ* " *ſæpe vindicantur. Summâ prudentia altiſſimi* " *viri et rerum naturæ peritiſſimi maluerunt,* " *velut incredibile et ultra audaciam poſitum,* " *ſcelus præterire, quam, dum vindicant, oſten-* " *dere poſſe fieri. Facinus aliquando poena* " *monſtravit: periculoſum eſt oſtendere civitati,* " *quanto plures mali ſunt.*"

CHAP. XXIII.

Of Crimes relative to Property.

§. 1. UNDER this head, the offence of wilfully burning the houſe of another is conſidered as of the blackeſt malignity; being fatal to the ſecurity of the innocent occupier, dangerous to the lives, and poſſeſſions of perſons, even unknown, unlimited in its conſequences, and merely malicious in its motive.

[b] Cic. Orat. pro Sext. Roſc. Amerino, ca. 25.

[c] Seneca de Clement, L. 1. ca. 23.

By

By the ancient laws of England,[d] it was a felony, and one of thoſe capital offences, for which no ranſom was allowed; and Briton tells us, that perſons convicted thereof were burnt to death, probably under the idea of retaliation, or at leaſt to make the puniſhment ſavour in ſome degree of the crime.[e] Such whimſical connections have frequently influenced the minds of Lawgivers. It might, for inſtance, be difficult to conceive, why the 22d H. 8. c. 9.[f] ſhould direct the crime of wilful poiſoning to be puniſhed by boiling to death; were we not informed by the preamble, that John Rooſe, a cook, had been lately convicted of throwing poiſon into a large pot of broth prepared for the Biſhop of Rocheſter's family, and for the poor of the pariſh; and the ſaid John Rooſe, was, by a retroſpective clauſe of the ſame ſtatute, ordered to be boiled, perhaps in his own kettle.[g] But

[d] Leg. Cnuti, L. 61.

[e] Iſſint que ils ſoient punies per meſme le choſe, dont ils pecherent. Brit. fo. 16.

[f] The ſame ſtatute forced the name of high-treaſon upon the crime of poiſoning. "And in 33 H. 8. Margaret Davy, a young woman, was attainted thereof for poiſoning her miſtreſs. And ſome others were alſo boiled to death in Smithfield, on the 17th day of March in the ſame year. 3. Juſt.

[g] Obſervations on the Ancient Statutes, pa. 406.

I return to the deſcription of Arſon, which is given by the mirror, in the the following extenſive terms:[h] "*Ardours ſont, que ardent* "*citie, ville, maiſon home, maiſon beſte, ou* "*autres chatelx, de leur felony, en temps de* "*peace, pur haine ou vengeance.*" In ſubſequent ages it underwent various alterations, both in its definition, and puniſhment; and at length by the 9th Geo. 1. c. 22. made perpetual by 31 Geo. 2d c. 42. it was, with many other offences, made felony without benefit of clergy, to "ſet fire to any houſe, "barn, or out-houſe, or to any hovel, cock, "mow, or ſtack of corn, ſtraw, hay, or "wood."

I have given a literal tranſcript of this clauſe as a ſtrong inſtance of the vague, unfeeling, undiſtinguiſhing careleſſneſs, with which penal laws are compoſed, even in the moſt poliſhed times. The penalty ſhould in all caſes, if poſſible, bear ſome proportion to the malice, and miſchief of the offence; but every idea of proportion is obliterated, when the ſame degree of guilt, and puniſhment, is aſſigned to the incendiary of a populous town, and to the deſtroyer of a ſmall heap of dried graſs,

[h] Myrrour, c. 1. §. 8.

The

The ſame ſeverity is ſhewn by the above-mentioned act to all perſons, "who ſhall cut down, or *otherwiſe* deſtroy any trees planted in any avenue, or growing in a garden, orchard, or plantation, for ornament, ſhelter, or profit; though, by a former act, it continues only a clergeable felony, to ſet on fire any wood, underwood, or coppice. And by the 10th Geo. 2d, c. 23. perſons maliciouſly ſetting on fire, any mine, pit, or delf of coal, are made guilty of felony without benefit of clergy.

§. 2. "He that by night breaketh and "entereth into a manſion houſe *with intent to* "*commit a* [l] *felony*," is in the degree of his offence the next object of inquiry.

Excluſive then of the permiſſion given by our law to the alarmed inhabitant to kill his aſſailant,[k] the ſword of juſtice is alſo drawn againſt ſuch aſſailant, and puniſheth him with death, in caſe he ſhould, by ſuperior ſtrength,

[l] Co. 63.—And therefore an indictment for breaking into the houſe of AB. with intent ad verberandum ipſum AB. is no burglary, becauſe it is no felonious intent.

[k] It was in like manner one of the Laws of the twelve tables. "Si noctu furtum ſit, jure cæſus eſt.

or

or otherwiſe, eſcape alive from the execution of his purpoſe; and not only the principal is made guilty of felony without benefit of clergy, but alſo the acceſſary before the fact.

The atrociouſneſs of this crime conſiſts chiefly in the terrors brought upon thoſe, who are found aſleep and defenceleſs; and are deprived of that ſecurity in which they have a natural confidence.

For this reaſon the indictment muſt charge the houſe to have been a manſion-houſe at the time of the burglary; yet it may be doubted, whether our law hath not in ſome degree departed from this idea, in holding that, "where the owner quitteth his houſe "*animo revertendi*, it may ſtill be conſidered "as his manſion-houſe, though no perſon be "left in it," nor found there at the time of the fact committed.[1]

[1] Bl. 4. 225. and Foſter, 77. who cites expreſsly the long vacations of lawyers, and the ſummers of citizens, as inſtances of ſuch quitting animo revertendi—"the breaking in ſuch caſe (ſaith Sir Matthew Hale) is burglary, and the indictment *ſhall ſuppoſe* it domus manſionalis."

Hale's P. C. p. 556.

There

There muſt be both an actual breaking and an entry, to complete the crime. And here alſo it ſhould be obſerved, that Sir M. Hale ſeems to ſpeak with an inadvertence, and latitude, very unuſual to his temper in caſes capital, when he ſays, that, if a hole be made in the houſe one night, with intent to commit a felony, and the ſame breakers enter the next night through the ſame, they are burglars: "for the breaking, and entering, were both "*noctanter*, though not the ſame night; and "*it ſhall be ſuppoſed*, that they brake and en-"tered on the night when they entered, *for* "the breaking makes not the burglary, until "the entry."

I am perhaps miſtaken in thinking there is a degree of ſeverity in this opinion; for it certainly hath not been the inclination either of Sir M. Hale, or of thoſe,[m] who have followed him, to *ſuppoſe any thing*, that ought not to be ſuppoſed, againſt a perſon under a capital accuſation. Yet it ſhould ſeem, that in the interval between the breaking, and the entry, it is the duty of the occupier rather to repair the damage, than to leave it a temp-

[m] Commentaries, pa. 226.

tation

tation to further attacks; and conſiſtently with this it hath been holden, that if a perſon leaves his doors, or his windows open, it is his own folly, and negligence; and, if a man enters therein, it is no burglary.

Opening the caſement, unlatching the door, picking the lock, gaining admiſſion by falſe pretences, going down the chimney,* which is as much cloſed as the nature of things will permit, are all ſeverally acts, which, in conſtruction of law amount, to an actual breaking.

The entry may be previous to the breaking; for by Stat. 12. Ann c. 7. if a perſon enters into, or is within the dwelling-houſe of another without breaking in, either by day or by night, with intent to commit felony, and ſhall

* In the trial of a priſoner at Cambridge, Sir M. Hale "was doubtful whether this was burglary, and ſo were "ſome others; but upon examination it appeared, that, "in his creeping down ſome of the bricks of the chimney "were looſened, and fell down in the room, *which* (ſays "he) *put it out of queſtion*, and direction was given to find "it burglary." V. 1. pa. 552.

It would not be eaſy for any man, whoſe underſtanding hath not the advantage of a profeſſional education, to conceive how the nature of the crime ſhould be varied by ſo trivial an accident. Such deviations of ſound ſenſe into ſophiſtry are too often the conſequences of legal reaſoning.

in

in the night break out of the ſame, this is declared to be a burglary.

Here too the conſtruction ſeems to have exceeded the true idea of the offence, when it is holden, that, to put a hand or a hook, in at the window, to draw out goods, is a burglarious entry.*

I have expreſſed the more anxiety on this ſubject of burglary, becauſe the ſelfiſh ſenſibilities of mankind may be too apt to excite an incautious indignation againſt the perſons accuſed thereof; and becauſe the liſts of capital executions ſhew it in fact to be peculiarly fatal to Engliſhmen.

If the exiſtence of thoſe, who are convicted of this offence, be really dangerous to the ſafety of ſociety, it is certainly both juſtifiable and

* See the caſe of Gibbons, as reported by one of the judges who tried him. "It appeared in evidence, that the "priſoner in the night time cut a hole in the window ſhutters of the proſecutor's ſhop, which was no part of his "dwelling-houſe, and putting his hand through the hole "took out watches, and other things, which hung in the "ſhop within his reach; but no entry was proved, otherwiſe than by putting his hand through the hole. This "was holden to be burglary and the priſoner was con"victed. Foſter, 108.

proper

proper to puniſh it with death; but this criterion of propriety, and lawfulneſs, ought moſt ſtrictly to be regarded.

It deſerves obſervation, that the puniſhment of breaking on the wheel, as practiſed in France, was firſt introduced, and applied againſt this offence by Francis the firſt A. D. 1534, in the following words. "*Tous ceux* "*qui auront été duement atteins et convancus* "*par Juſtice deſdits délits, crimes et maléfices,* "*ſeront punis en la maniere qui ſ'en ſuit: c'eſt* "*á ſcavoir les bras leur ſeront briſées, et rom-* "*pus en deux endroits, tant haut qué bas, avec* "*les reins, jambes et cuiſſes, et mis ſur une roue* "*haute, plantée et élevée, le viſage contre le ciel,* "*oú ils demeureront vivans, pour y faire peni-* "*tence tant et ſi longuement qùil plaira a notre* "*ſeigneur les y laiſſer: et morts, juſqú á ce qúil* "*en ſoit ordonne par Juſtice, afin de donner* "*crainte, terreur, et example, á tous autres* "*de n' échoir ni tomber en tels inconveniens.*"

This puniſhment is applied by the ſame edict to highway robberies; and the ſame form of words is conſtantly uſed at this day.[p]

[p] Code penal. p. 101.

Though

Though burglary may be committed without any abduction of the property of others, either intended or completed, yet in general ſo audacious a breach of the peace of ſociety is commenced *Cauſâ Lucri*, and conſequently attended by theft; in which caſe it is a mere aggravated ſpecies of larceny.

§. 3. Larceny, when conſidered as a generical term, is the felonious taking and carrying away of the perſonal goods of another. [q]

The felonious intent cannot be preſumed from the wrongful poſſeſſion; it muſt reſult from the evidence given, that the taking was committed *animo furandi*. [r] "I would never (ſays Sir M. Hale) "convict any perſon for "ſtealing the goods *cujuſdam ignoti*, merely "becauſe he would not give an account how "he came by them, unleſs there were due "proof made, that a felony was committed

[q] Contrectatio rei alienæ fraudulenta, cum animo furandi, invito ejus domino cujus res illa fuerit.
Bracton. L. 3. 150. Fleta. L. 1. ca. 36. Hale Hiſt. P. C. 290. v. 2.

[r] For if A find the purſe of B in the highway, and take it, and carry it away, and this with all the circumſtances that may prove it to be done, animo furandi, as denying it or ſecreting it; yet it is not felony. By the Swediſh law it is felony.

of

"of theſe goods." *Tutius ſemper eſt errare ex parte miſerecordiæ, quam ex parte Juſtitiæ.* This worthy Judge, though unfortunate in caſes of witchcraft, was in every inſtance peculiarly anxious, that perſons really innocent might not be entangled under thoſe preſumptions, which many times carry great probability of guilt.

If the felonious intent ſhould be clearly proved, ſtill it will not amount to a felonious taking; unleſs it ſhould appear, that the poſſeſſion was gained without the conſent of the owner.

It may at firſt view appear, that this diſtinction hath many exceptions in the law of England; as in the caſes of ſervants embezzling their maſters goods to the value of forty ſhillings;[s] of perſons having the cuſtody of the king's ammunition or habiliments of war, and embezzling the ſame;[t] of a gueſt robbing

[s] By 21. H. 8. c. 7. See alſo 33. H. 6. c. 1. which act is ſtill in exiſtence, and inflicts an attaint of felony on the ſervant's default of appearance to anſwer the maſter's executors in a civil ſuit.

[t] 31. Eliz. c. 4. & 22. C. 2d. c. 5. which takes away the benefit of clergy from this offence, ſo far as it relates to naval ſtores. See alſo 1. Geo. 1. c. 25.

his

his inn or tavern of a piece of plate ſet before him; [a] of a lodger running away with furniture from his lodgings; [w] who are all ſeverally puniſhable, as felons guilty of larceny. But it ſhould be obſerved, that, in all ſuch inſtances, the taking is actual; the offender having only the liberty of uſe, and not the poſſeſſion by delivery.

Very different [x] is the offence of A, who rides away with a horſe, which is lent to him by B; or of the Carrier, who ſecretes, and converts to his own uſe, the pack, or parcel, which is delivered to him. *The property here is ſevered from the poſſeſſion*; and ſuch perſons are guilty only of the violation of a civil truſt, and are puniſhable accordingly. Yet it hath been ſaid by Sir E. Coke, and adopted by a very learned writer, [y] that, if the carrier openeth the bale of goods, and taketh *only a part* thereof, it is ſo manifeſt an evidence of the *animus furandi*, that it amounts to larceny.

[a] Hale H. P. C. 506. v. 2.—1. Hawk. P. C. 90.

[w] 3. & 4. W. & M. c. 9.

[x] I venture to uſe this expreſſion, though the very learned obſerver on the ancient ſtatutes hath expreſſed a doubt, whether any reaſonable line of diſtinction can be drawn between the caſes here placed in oppoſition. Obſ. p. 371.

[y] 3. Inſt. 107. Comment. 4. 230.

ὁσῳ πλεον ἡμισυ παντος.

It muſt be confeſſed, that by the civil law, ſuch breaches of truſt, amounted in general to larceny. "*Si creditor pignore, ſive is, apud* "*quem eſt depoſita, eâ re utatur; ſive is, qui* "*rem utendam accepit, in alium uſum eam* "*transferat, quam cujus gratiá ei data eſt;* "*furtum commiſiſſe videtur.*"

There muſt be an abduction or carrying away; but a bare removal of things taken, though immediately interrupted by detection or apprehenſion, ſatisfieth this part of the definition.

It would lead me into an endleſs intricacy of diſcuſſion, were I to enter upon the detail of the ſeveral ſpecies of property, which come under the idea of the perſonal goods of another.

No larceny could be committed at the common law on chattels real, or things adhering to the freehold. This narrowneſs was founded rather on the prejudices of legal language, than in the concluſions of reaſon; and hath been remedied by various ſtatutes. The ſtealing of writings, relating to a real eſtate, ſtill

continues

continues only a treſpaſs;[a] but in general, the law on this point hath run into the oppoſite extreme of ſeverity; and many things are become objects of larceny, which ought never to have been conſidered in that predicament.

It may be a ſufficient proof of this laſt aſſertion, that the ſtealing by night of any trees, or of any roots, ſhrubs, or plants, to the value of five ſhillings, is by 6. *Geo.* 3. c. 36. made felony in the principals, aiders, and abettors, and in the purchaſers thereof, knowing the ſame to be ſtolen. There is another milder act ch. 48. relative to the ſtealing of timber trees, ſhrubs, &c. by day or by night. It is undoubtedly true, that *mild puniſhments are the beſt ſafeguards againſt ſuch delinquencies.*

Bonds, bills, notes, &c. are by the 2d Geo. 2. c. 25. and very properly, conſidered, with reſpect to larceny, of the like value with the money, which they repreſent.

[a] See the caſe of the king againſt Webſter. Trin. 13. G. 2. in B R Stra. 1133. it was found by the ſpecial verdict, that the defendant had ſtolen a commiſſion to ſettle boundaries, and alſo another parchment relative thereto, each value one penny. The queſtion was fully argued, and it was determined not to be a felony.

I have heretofore occaſionally cited many of our very harſh proviſions relative to game. Larceny may alſo be commited of all valuable and domeſtic animals, as horſes,[a] oxen, ſheep,[b] hens, geeſe, &c. and of all animals *feræ naturæ*, proper for food, and known ſo as to be reclaimed.

It is enacted by ſtatute 37, Ed. 3d, ca. 19. "That if any ſteal any hawk, and the ſame "carry away; it ſhall be done of him as of "a thief, that ſtealeth a horſe or other thing." "In reſpect, ſaith Sir E. Coke,[c] *of the noble* "*and generous nature and courage of faulcons*, "ſerving *ob vitæ ſolatium* of princes, and of "noble and generous perſons, to make them "fitter for great employments."

In judgment of law, a man may, under certain circumſtances, be ſaid to have taken the goods of another; though he himſelf hath the general property in the goods taken. A delivereth goods to B to keep for him, and then ſtealeth them, with intent to charge B

[a] Stat. 1 Edw. 6. c. 12.—2 and 3 Edw. 6. c. 33. 31 Eliz. c. 1.

[b] Stat. 14 Geo. 2. c. 6.—15 Geo. 2. c. 34.

[c] 3. Inſt. pa. 109.

with

with the value of them. Or, A having delivered money to his ſervant to carry to ſome diſtant place, diſguiſeth himſelf, and robbeth the ſervant on the road, with intend to charge the hundred. Both theſe caſes are larceny[4] in A. "For the money and goods are taken "from thoſe, who have a ſpecial temporary "property in them, with a wicked and "fraudulent intention."

§. 4. I have now given the general deſcription of larceny, and am next to conſider its different ſpecies or degrees of enormity.

Of burglarious larceny I have already ſpoken; the next in degree is Robbery, or "the "open and violent taking of money or goods "from the perſon of another, by force, or "intimidation."

If the thief, finding the thing taken of little value, ſhould return it; or if, after taking it, he ſhould drop it through fear or by accident; ſtill it is a robbery: for *the outrage offered to the rights of ſociety doth not vary in its nature, becauſe ineffectual in its conſequences.*

[4] Foſter pa. 124. 1 Hale 513. Stanf. 26.

A taking of the goods of another in his preſence only, as in the caſe of taking parcels out of a waggon, amounts to taking from the perſon, if done by putting him in fear; and "the law, in *odium ſpoliatoris*, will preſume "fear, where there appeareth to be a ſuffi-"cient ground for [e] it;" requiring only, that the fact be attended with thoſe circumſtances of violence or terror, which in common experience are likely to induce a man to part with his property, for the ſafety of his perſon.

The benefit of clergy is taken from this ſpecies of larceny, whereſoever committed, by ſtat. 3. & 4. W. & M. c. 9. and the value of the thing taken is immaterial. An attempt to commit this offence is by ſtat. 7. Geo. 2. c. 21. made a felony, tranſportable for ſeven years.

This crime is certainly a very audacious violation of the ſocial compact, and proper to be ſeverely puniſhed by the laws of ſociety; yet it may be doubted, whether it be of that heinous kind, which requires the *ultimum ſupplicium*; particularly when not aggravated by

[e] Foſter 129.

perſonal

perſonal injuries to the party robbed. We have many inſtances of a peculiar generoſity in the nature of Engliſh robbers; yet it may admit of a queſtion, whether it be not dangerous to ſociety, to leave ſo little diſtinction between the puniſhment of ſimple robbery, and robbery perpetrated with murder.[f]

§. 5. It cannot be too ſtrongly inculcated, that capital puniſhments, when unneceſſary, are inhuman, and immoral; a conſideration very applicable to the puniſhment, inflicted by our laws on the crimes, which I am next to mention.

Private larceny from the perſon, of any money or goods above the value of twelvepence, is deprived of the benefit of clergy by the 8th Eliz. c. 4. "that the fraternity or "brotherhood of cutpurſes and pickpockets (as they are deſcribed in the preamble) "may "not continue to *live idle* by the ſecret ſpoil "of good and true ſubjects." A public and well-regulated workhouſe would have been a

[f] A la Chine les voleurs cruels ſont coupès en morceaux, les autres non: cette difference fait que l'on y vole, mais que l'on n'y aſſaſſine pas.

En Moſcovie, ou la peine des voleurs, et celle des aſſaſſins ſont les mêmes, on aſſaſſine tonjours; les morts, y dit on, ne racontent rien. L'Eſpr. des loix. l. 16. ch. 6.

more proper remedy for this offence. "The "puniſhment of robbery, not accompanied "by violence, ſhould (ſays Beccaria) be pe-"cuniary; he, who endeavours to enrich "himſelf by the property of others, ſhould "be deprived of part of his own. But this "crime alas! is commonly the effect of mi-"ſery and deſpair; the crime of that unhappy "part of mankind, to whom the right of ex-"cluſive property hath left but a bare exiſt-"ence." It would be abſurd then to extort pecuniary ſatisfaction from thoſe, who are already ſtruggling in the extremity of want; but there would be no abſurdity in the infliction of temporary impriſonments, with compulſion to labour; a mode of puniſhment, which, by inducing a habit of induſtry, and by the effects of that habit, would be equally beneficial to the criminal and the public.

§. 6. Larceny from the houſe, whether privily committed without violence, or openly in the day time, and therefore in neither caſe amounting to burglary, is nevertheleſs by the laws of England made capitally penal in almoſt every inſtance; and this by a multiplicity of ſtatutes, ſo complicated in their limitations, and ſo intricate in their diſtinctions, that it would

would be painful on many accounts to attempt the detail of them. It is a melancholy truth, but it may without exaggeration be aſſerted, that, excluſive of thoſe, who are obliged by their profeſſion to be converſant in the niceties of the law, there are not ten ſubjects in England, who have any clear perception of the ſeveral ſanguinary reſtrictions, to which on this point they are made liable.

A modern writer, whoſe Book is peculiarly calculated for the general benefit of mankind, hath by a diligent collation of the ſtatutes, to which I allude, reduced this chaos to ſome degree of order. I ſhall tranſcribe from his account,[5] that the benefit of clergy is now denied upon the following ſuppoſed aggravations of larceny; viz. "in all larcenies above "the value of twelve-pence from a church, "or from a dwelling-houſe, or booth, any "perſon being therein; in all larcenies, to "the value of five ſhillings, committed by "breaking the dwelling-houſe, though no "perſon be therein; in all larcenies to the "value of forty ſhillings from a dwelling-"houſe or its out-houſes, without breaking

[5] Commentaries, 4, 220.

"in,

" in, and whether any perſon be therein or " no; and in all larcenies to the value of five " ſhillings from any ſhop, warehouſe, coach- " houſe, or ſtable; whether the ſame be " broken open or not, and whether any per- " ſon be therein or no. In all theſe caſes, " whether happening by day or by night, the " benefit of clergy is taken away [h] from the " offenders."

§. 7. Theſe ſeverities have with great plauſibility been aſcribed [i] to the increaſing opulence of the kingdom; and indeed there ſeems ſufficient reaſon to believe, that ſanguinary laws are the probable conſequence of national proſperity. Senſibility ſleeps in the lap of luxury; and the legiſlator is contented to ſecure his own ſelfiſh enjoyments, by ſubjecting his fellow citizens to the miſeries of a dungeon, and the horrors of an ignominious death. Still however he feels a tacit diſapprobation of the laws, which he hath enacted; and even, when injured, heſitates to bring the offender to juſtice. He knows, that the

[h] Stat. 23 Hen. 8. c. 1. 25 Hen. 8. c. 3. 1 Edw. 6. c. 12. 5, and 6 Edw. 6. c. 9. 39 Eliz. c. 15. 3, and 4 W. and M. c. 9. 10, and 11 W. 3. c. 23. 12 Ann c. 7.

[i] Obſervations on the Ancient Statutes, 375.

puniſhment

puniſhment is diſproportionate to the offence; or at leaſt, if humanity be obliterated by intereſt, he foreſees, that the puniſhment cannot be inflicted, without raiſing the indignation of ſociety againſt the accuſer. The delinquent therefore is diſcharged without proſecution; he repeats the crime under the expectation of repeated mercy; he becomes gradually familiar with diſhoneſty; and at length falls a victim to that prepoſterous ſeverity of the law, which hath ſo long been the ſubject of his mockery. It is a property inſeparable from harſh laws, that they are neither regular, nor expeditious in their execution; conſequently, that they flatter the hope of impunity, and, equally injurious to the ſociety and to the criminal, tend to the fatal multiplication both of crimes and of puniſhments.

Excluſive of the ſeveral larcenies, which I have already deſcribed, and their reſpective penalties; it is, and hath been from the year 1109, the law of England, that in general all perſons guilty of larceny above the value of twelve-pence ſhall be hanged. *Animadverte autem in quantam aſperitatem, ex rerum temporumque viciſſitudine, lex antiqua abripitur.*

Quod

Quod enim olim 12 *vænit denariis, hodie ſæpe* 20 *ſolid, imo* 40, *vel pluris eſt; nec vita hominis intereá charior, ſed abjectior.* This well grounded complaint was publiſhed by Sir Henry Spelman above a century ago; during that long interval the grievance hath been gradually increaſing, and ſtill remains unredreſſed.

But the error lies deeper. *Money, which in its nature is of fluctuating value, is in no caſe proper to be made the ſtandard meaſure of criminality.* When the puniſhment of the offender depends on the value of the thing ſtolen, the adjudication of the law is vague and uncertain. Mercy alſo is admitted under the ſhield of interpretation; the impulſes of benevolence are oppoſed to the obligations of religion; and jurors are taught to trifle with their oaths, and to call ſuch trifling "a kind of pious perjury."

In fact, upon trials of larcenies ſo limited, it is commonly found to be the chief anxiety both of judges and of jurors, to reduce the crime below its real predicament, by reducing the conviction below the value affixed by law. Such an anxiety is the natural conſequence

quence of laws, which, by an abſurd diſtinction, make a trivial difference between two ſums the criterion of a capital crime; and enact, that a penny more or leſs ſhall be equivalent to the life of a man.

In ancient times, larceny was puniſhed in ſome caſes with the loſs of a thumb,[k] in others with pillory, and the loſs of an ear. The next ſtep was demembration, by cutting off the hand or foot,[l] but this only after repeated acts. At length, by our Saxon laws, it was nominally, when of the value of twelve pence, puniſhed with death; but the penalty was redeemable by pecuniary compoſition, which was called *capitis æſtimatio*. By the laws of Ethelbert this compoſition was a threefold reſtoration, beſides a fine to the king, and, if the thing were ſtolen from the king, the reſtoration was nine-fold; but by the 9th Hen. 1ſt[m] it was enacted, "*ut ſi quis in furto* "*vel latrocinio deprehenſus fuiſſet, ſuſpenderetur*; "*Sublata Weregildorum, id eſt pecuniariæ re-* "*demptionis, lege.*"

[k] Corone, 434. Briton, 24. 6.

[l] Laws of K. Ina. Lambard, L. 18. paganus ſæpius furti infimulatus, ei manus et pes præciditor.

[m] Leg. Angloſax, p. 304.

§. 8.

§. 8. Forgery, which is defined to be the fradulent making, or alteration of a writing, with intent to prejudice the right of another, is alſo a crime againſt property.

It appears to have been a ſpecies of the *crimen falſi* among the Romans; but it is rarely mentioned by them, or in the laws of other ancient nations; and the reaſon is obvious.

The increaſe of modern riches, the invention of paper, the many complex ſecurities, and repreſentations of property, the inſtitution of national funds, and rules of written evidence, have all contributed to render forgery a conſideration of great extent, and importance. The offender by 5 Eliz. c. 14. is puniſhed by forfeiture to the party aggrieved of double coſts and damages; by ſtanding in the pillory, and having both his ears cut off, and his noſtrils ſlit, and ſeared; by forfeiture to the crown of the profits of his lands, and by perpetual impriſonment. *I have cited this ſtatute*, which extends only to certain forgeries therein deſcribed, *merely as proper to be repealed.* At preſent, the imitation of ſtamps, in order to defraud the Stamp Office, the antedating a deed of conveyance, in order to

over-

over-reach a former deed, an alteration in the name, and deſcription of the premiſes conveyed, or in the ſum of money ſecured by bond, or other deed, or in the limitations of an eſtate intended to paſs, all theſe acts, and others of the like nature, tending to eſtabliſh a falſe and fradulent title to property, whether in the name of a real or fictitious perſon, are forgeries; and there is hardly a caſe of this kind, poſſible to be conceived, and deſcribed, which hath not in the courſe of the preſent century been made a capital crime. The ſtatutes for that purpoſe are innumerable; for, excluſive of many general proviſions, it is become uſual, upon the iſſuing of new bills of credit, lottery-orders, army-debentures, &c. to add a ſpecial clauſe of forgery relative to the ſubject then in queſtion.[n] Here therefore, if any where, may be applied the obſervation, *Pluit ſuper populum laqueos legum accumulatio.*[o]

[n] De Augm. Scient.

[o] It is alſo a felony, without benefit of clergy, to make a falſe entry in a marriage regiſter; to alter it when made; to forge, or counterfeit ſuch entry, or a marriage licence, or aid, and abet ſuch forgery; to utter the ſame as true, knowing it to be counterfeit; or to deſtroy or procure the deſtruction of any regiſter, in order to vacate any marriage.

§. 9.

§. 9. There are alſo a great variety of injuries againſt private property, which are in no degree fraudulent, but merely malicious; under this head the crime of Arſon is of the blackeſt dye, beeauſe deſtructive both of life and property. It hath however been thought expedient by the Engliſh legiſlature, to extend the ſame degree of puniſhment to many miſchiefs of very inferior criminality. Such are the offences of perſons deſtroying turnpike gates upon roads; or poſts, rails, or other fence, or fences, belonging to ſuch turnpike gates; or the ſluices, flood-gates, or other works of navigable rivers; of perſons cutting any hop-binds growing in a plantation of hops; breaking down the head, or mound of any fiſh-pond, whereby the fiſh are loſt and deſtroyed;[p] *killing, maiming, or wounding any cattle*; ſuch alſo is the offence of wilfully and maliciouſly tearing, ſpoiling, cutting, burning, or defacing the garments or cloaths of any perſon, or perſons, which is in like manner made a felony, though within the benefit of clergy.[q] If the legiſlature had not given re-

[p] Geo. 1. c. 22.

[q] 6th of Geo. 1. ch. 23. which is entitled an act for the further preventing robbery, burglary, and other felonies, and for the more effectual tranſportation of felons. The clauſe relative to cloaths *is to be found* in the laſt ſection.

peated

peated, and deliberate proofs of a different ſentiment, the puniſhment of death would ſeem by no means applicable to delinquencies, which are merely in the nature of civil treſpaſſes.

The Stat. 2d in the 12th year of Q. Ann, c. 18. is leſs liable to exception. All perſons making any hole in any veſſel in diſtreſs, or ſtealing any pump of ſuch veſſel, or who ſhall wilfully do any thing tending to the immediate loſs, or deſtruction of ſuch veſſel, are thereby declared to be guilty of felony without benefit of clergy.

CHAP. XXIV.

Of Crimes of poſitive Inſtitution.

§. 1. EVERY wanton, cauſeleſs, or unneceſſary act of authority exerted by the legiſlature over the people, is tyrannical, and unjuſtifiable; for every member of the ſtate is of right entitled to the higheſt poſſible degree of liberty, which is conſiſtent with the ſafety, and well being of that ſtate.

With this obſervation I proceed to inſtances, from which this part of my ſubject will receive its eaſieſt and beſt illuſtration.

When Lepidus celebrated his triumph over Spain, he commanded the whole Roman people *to rejoice upon pain of Death*; "*Sacris et* "*epulis dent omnes hanc diem*; *qui ſecus faxit* "*inter proſcriptos eſto.*" This proclamation muſt be conſidered in the nature of a temporary Law, and, as ſuch, was both abſurd and tyrannical.

A Man was capitally puniſhed at Athens, for having killed a ſparrow, which, to eſcape the purſuit of a Hawk, had taken ſhelter in his boſom: And the Areopagites put a Boy to death, for having picked out the Eyes of a little bird. The former caſe was thought a proof of a mind incorrigibly depraved; in the latter, "*non videntur aliud judicaſſe, quam id* "*ſignum eſſe periculoſiſſimæ mentis, et multis* "*malo futuræ, ſi adoleviſſet*;"[1] or, in the words of a more elegant writer,[2] "*il ne s'agit* "*point lá d'une condamnation pour crime, mais*

[1] Quinctil. Inſt. L. 5. ca. 9.

[2] L'Eſpr. des Loix. L. 5. ch. 19.

d'un

" *d'un jugement de moeurs dans une republique* " *fondée ſur les moeurs.*" Such might be the motive; but ſuch motives are not of that urgent neceſſity, which can authorize a legiſlature to place the Life of a Man in competition with that of an inſignificant bird. It muſt be confeſſed indeed, that, by the laws of England, the malicious killing or wounding of any cattle is at this day capitally puniſhed;[t] but ſeverities ſo prepoſterous confound every idea of proportion between the enormity of crimes, and the extent of their puniſhments.

It is a Law at Venice, that thoſe, who carry fire-arms about their perſons, ſhall ſuffer death. This law is founded in apparent utility; nevertheleſs it is contrary to the nature of things, to make the bare poſſeſſion of the means of miſchief equally penal with the moſt criminal uſe of thoſe means. I have before obſerved, that it is high-treaſon by the law of England to have in poſſeſſion any Inſtrument, or other Tool, not of common uſe in any trade, but proper only for coining.

[t] 9 Geo. 1. ch. 22.

Fleta mentions an ancient Engliſh law, which commanded every perſon contracting marriage with a Jew to be burnt alive. The blood of a Chriſtian family was ſuppoſed to be contaminated perhaps by ſuch a contract; but it would be difficult to prove, that any human Tribunal had a right to inſiſt on ſuch an expiation.

A law of the Viſgoths [x] compelled the Jews to eat every thing dreſſed with pork, but would not permit them to taſte the pork itſelf. In this we trace all the wanton cruelty of deſpotic enthuſiaſm.

The Emperors, Arcadius and Honorius, forbad upon pain of death all applications in favor of the guilty. They little conſidered, how unworthily the hand of Power is employed, in cloſing the eyes of Juſtice againſt mercy.

The Decemvirs authorized creditors to cut in pieces the bodies of their inſolvent debtors. One would wiſh to perſuade one's ſelf, for the credit of humanity, that this was only a figurative permiſſion to divide the effects.

[x] L. 12. tit. 2. § 16.

The

The purſuit of this ſubject might be amuſing; but I return to the laws of England, ſome of which I ſhall mention without any obſervations.

Every perſon ſhall forfeit his goods and chattels, lands, and tenements to the King, and ſhall be impriſoned during life, who ſhall be convicted of having acted as a broker, or agent, in any uſurious contract, where more than ten per cent. was taken [y]; or, who ſhall obtain a patent for the monopoly of gun-powder [z]; or who, being a counſellor, or other officer in the courts, ſhall practiſe without having taken the new oaths of allegiance, and ſupremacy, and without ſubſcribing the declaration againſt popery [a].

All perſons ſhall be guilty of felony, who ſhall *aſſemble* armed to the number of three, for the purpoſes of ſmuggling [b]; or, who ſhall ſerve a foreign ſtate without taking the oath of allegiance [c]; or, who ſhall bring into the realm Gally-halfpence [d]; or who ſhall tranſport wool

[y] 13 Eliz. c. 10.
[z] 16 Ch. 1. c. 21. and 1 Ja. 2. c. 8.
[a] 7 & 8 W. 3. c. 24. [b] 9 Geo. 2. c. 35. § 13.
[c] 3 Ja. . c. 4. § 18. [d] 3 H. 5. c. 1.

out of England; or who, being watermen, ſhall take [e] a greater number of paſſengers than are allowed, *if* [f] *any be drowned.*

It is felony without benefit of clergy, to remain one month in the realm, being an Egyptian; or to be found in the fellowſhip of Egyptians; and Sir M. Hale takes notice, that thirteen perſons were executed for this offence in one aſſizes at Bury. It is equally capital, if any perſon ſhall wilfully break any tools uſed in the woollen manufacture, not having the conſent of the owner [g]; or ſhall maliciouſly cut in pieces, or deſtroy any manufacture of linen cloth, or yarn, either when expoſed to bleach, or dry [h]; or ſhall wander, being a mariner, without the teſtimonial of juſtices [i], or ſhall knowingly receive, relieve, or maintain, Prieſts or Jeſuits [k]; or ſhall, during the term of tranſportation to the Britiſh colonies, voluntarily go into any part of the French,

[e] 10 Geo. 2. c. 31. § 9.

[f] In this caſe the criminalty is founded on the ſuppoſition of a caſual event; in like manner it hath been adjudged treaſon to break a priſon, *if any perſon be in durance*, though the perſons breaking did not know them to be impriſoned for any ſuch offence. Hales Hiſt. P. C. 141.

[g] 12 Geo. 1. c. 34.

[h] 4 Geo. 3. c. 37. § 16.

[i] 39 Eliz. c. 13. § 4.

[k] 27 Eliz. c. 2. § 4.

or

or Spaniſh dominions [l]; or ſhall be found in diſguiſe in the act of paſſing with prohibited or uncuſtomed goods; or ſhall forcibly hinder, obſtruct, aſſault, oppoſe, or reſiſt, any of the officers of the cuſtoms, or exciſe, in the ſeizure of any ſuch goods [m].

It would be eaſy to collect conſiderable additions to this diſmal catalogue; but the inſtances already given form a ſufficient foundation for the following remark.

Poſitive laws are thoſe, which do not flow from the general obligations of morality, and the general condition of human nature; but have their reaſon and utility, in reference to the *temporary* advantage of that particular community for which they are enacted. Every law therefore, which comes under this deſcription, ought to have a limited duration; and ſhould not be ſuffered to remain a burthen upon the people, when the grievance, for which it was framed, hath ceaſed, and is forgotten.

The accumulation of ſanguinary laws is the worſt diſtemper of a ſtate. Let it not be ſup-

[l] 20 Geo. 2. c. 46. § 1. [m] 19 Geo. 2. c. 34.

poſed, that the extirpation of mankind is the chief object of legiſlation. *Nous liſons de quelques empereurs de Maroc, qui uniquement pour faire parade de leur adreſſe, enlevent d' un ſeul coup de ſabre, en ſe remettant en ſelle, la tête de leur ecuyer.*

CHAP. XXV.

Of the Importance of this Subject.

§. 1. THUS far it hath been my endeavour, by a frequent appeal to reaſon and benevolence, to engage thoſe ſenſible, and good minds, which are ever ready to ſympathize with him, who pleads the cauſe of humanity. To excite the attention of that more numerous claſs of men, who are heated by the action, or diſſipated by the pleaſures of the world, may be wiſhed, but is not to be expected; though nothing is more certain, than that the ſubject of theſe inquiries deſerves the ſerious conſideration of every man amongſt us. "For "no rank, no elevation in life, no conduct, "how circumſpect ſoever, ought to induce "any reaſonable man to conclude, that the "penal

" penal ſyſtem doth not, nor poſſibly can, " concern him [a]." A very ſlight reflection on the numberleſs unforeſeen events, which a day may bring forth, will be ſufficient to ſhew, that we are all liable to the imputation of guilt, and conſequently all intereſted in the protection of innocence. And indeed it highly concerns the ſafety of every individual, not only that the innocent be protected againſt unmerited ſeverities, but that the guilty be conducted with certainty to that puniſhment, which the law hath annexed to their crimes: *Intereſt reipublicæ, ne delicta ſint impunita.* But let not this conſideration be ſuffered to induce an intemperate zeal, either in judges or proſecutors, to puniſh the perſon accuſed, becauſe a crime hath deen committed. If the proof be doubtful, let the wretch be left, if guilty, to be his own puniſher; to the cenſure of that internal tribunal, whoſe judgment is incapable of corruption, and whoſe terrors cannot be evaded by cunning, or colluſion.

It is a political truth, that, *when the penal laws are good, thoſe, who deſerve puniſhment, rarely eſcape the arm of Juſtice.*

[a] Foſter's Crown Law, Pref. p. 3.

Cur

Cur tamen hos Tu
Evaſiſſe putes, quos diri conſcia facti *
Mens habet attonitos, et ſurdo verbere cœdit,
Occultum quatiente animo tortore flagellum?
Pœna autem vehemens, ac multo ſævior illis,
Quas et Cæditius gravis invenit aut Rhadamanthus,
Nocte dieque ſuum geſtare in pectore teſtem [P].

CHAP. XXVI.

Of the Compoſition and Promulgation of Laws.

§. 1. IN the courſe of this inquiry, I have conſidered the original contract of ſociety, the inſtitution of penal reſtrictions, and the different effects of different penalties upon the ſentiments of mankind; the nature

* The ſame idea is finely expreſſed by our own poet, who ſeems to have poſſeſſed the ſingular power of turning his genius to every train of ideas, of which the mind of man can be capable:

Tremble, thou wretch
That haſt within thee undivulged crimes,
Unwhipt of juſtice: hide thee, thou bloody hand;
Thou perjur'd, and thou ſimilar man of virtue,
Thou art inceſtuous: Caitiff, to pieces ſhake,
That under covert and convenient ſeeming
Haſt practis'd on man's life.

[P] Juv. Sat. L. 13. v. 192.

alſo

alſo of criminalty, the ſeveral ſpecies of crimes, and the particular degree of correction, to which, morally and politically, each crime ought to be ſubjected, have in their turn been taken notice of.

But theſe are the ground-works only of the ſyſtem of government; the promulgation, and execution of penal laws are the ſuperſtructure.

Here then we diſcover new matter for examination; too multifarious indeed, and too important, to be brought within the compaſs of the preſent deſign. I ſhall confine my attention therefore to the outlines only of this part of my ſubject; ſtill anxious to eſtabliſh the rights of humanity upon the principles of reaſon and benevolence; principles, applicable only to the legiſlation of thoſe happy communities, where the good of All is the great object of All; and which bear no reference, either to that unnatural mode of government, which is known by the name of Deſpotiſm; or to thoſe abuſed Ariſtocracies, which ſeek the gratification of a few in the deſolation of many. Paſſive obedience hath no principles. Man is not created to ſubmit to the arbitrary caprice of creatures like himſelf; "It is ne-

"ceſſary

" ceſſary to make a bad ſubject, in order to " form a good [q] ſlave."

§. 2. On the promulgation of every new law, it ſhould not eſcape the attention of the lawgiver, that *public virtue is the love of the laws*. For the love of the laws is followed by the love of our country, and is conſequently productive both of rectitude of conduct, and purity of morals. Public virtue, thus defined, is the true end of government; but harſh and ſanguinary laws have a tendency to check the attainment of this end; for they cannot be executed without raiſing the indignation of the ſufferer, and the abhorrence of his fellow-citizens. Vague and uſeleſs laws, have the ſame evil tendency; for it may with truth be affirmed, that public virtue bears a proportion to political freedom; [r] and that political freedom decreaſes in proportion to the uncertainty and multiplicity [s] of penal laws.

[q] L'Eſprit des Loix.

[r] The ignorance of the people alſo diminiſhes in proportion to the increaſed freedom of the government.

[s] And therefore it rarely happens, that very flouriſhing ſtates retain a great degree of liberty; for the laws neceſſarily bear a relation, not only to the principle and nature of the conſtitution, but to the opulence, extent, and populouſneſs of the country.

§. 3.

§. 3. It is eſſential to political freedom, and conſequently to public virtue, that no man be compellable to do any thing, to which the laws of ſociety do not compel him; or to abſtain from any thing which the laws have not prohibited. Hence reſults a general right to do with impunity any action, not prohibited by antecedent law; for every penalty muſt in its nature commence *in futuro*: *Moneat Lex oportet, priuſquam feriat.*

When the Ducheſs of Norfolk was attainted by the parliament, [t] for having known and concealed the vicious Life of Catherine Howard before her marriage; ſhe was attainted for a concealment, which, without the ſpirit of vaticination, ſhe could not know to be criminal. Her conduct had been in itſelf innocent; her guilt was then firſt created by the legiſlature; and ſhe was in fact puniſhed for having eyes, ears, and a grand-daughter. But retroſpective laws are generally unjuſt.

§. 4. It is alſo eſſential to political freedom, that the mandates, and prohibitions of law be not extended to any action, not im-

[t] Stat. 33. H. 8. c. 21.

moral

moral in its nature, nor prejudicial to the well-being of ſociety in its conſequences.

When the Ruſſians reſented the attempt of the Czar Peter to cut off their beards, their reſentment did not ariſe from a belief, that Liberty conſiſts in the privilege of being exempted from the raſor; but they miſconceived the attempt to be founded in the mere wantonneſs of power; and their reaſon, uncultivated as it was, informed them, that, in matters of indifference, unreſtrained freedom is one of the indelible privileges of mankind.

Under this head it may be obſerved, that laws very ſevere in their nature, but originally not inconſiſtent with ſound policy, are ſometimes ſuffered to retain their force, long after their ſubject-matter hath ceaſed to be of any conſequence to the intereſts of ſociety. Such, for inſtance, is that ſtatute,* under which it is at this day a capital offence, to give corn, cattle, or other conſideration, to the Scots for protection. It would be eaſy to produce many other inſtances equally exceptionable. And

* Stat. 43. Eliz. c. 13.

this

this is the neceſſary conſequence of having given an unlimited exiſtence to laws, made for the correction of preſent evils. In the promulgation of ſuch laws it ſhould be obſerved, that they are founded in the momentary exigencies of ſociety, and reſemble that neceſſity, which, in caſes of extreme famine, obliges men to eat each other. They ceaſe to eat men, in ſuch caſes, as ſoon as bread can be obtained.[x]

§. 5. It is farther eſſential to political freedom, that the laws be clearly obvious to common underſtandings, and fully notified to the people.

Anciently the laws were compoſed in verſe, which were frequently ſung in public,[y] that men might remember them. The laws of the twelve tables were ſo well known, that, in the time of Cicero, children learnt them by

[x] See the French Commentary on Beccaria.

[y] Ariſtot. Probl. §. 19. & Horat. Ars Poet. 395.

Fuit hæc ſapientia quondam
Publica privatis ſecernere, ſacra profanis;
Concubitu prohibere vago; dare jura maritis;
Oppida moliri; *leges incidere ligno.*
Sic honor et nomen divinis vatibus, atque
Carminibus venit.

heart

heart in the firſt rudiments of their [z] education. At Athens the laws were written upon tables in large characters, and hung up in public places on the walls. The invention of printing, and the eaſy circulation of printed papers, have made theſe precautions unneceſſary in our times; but, in England, the effectual promulgation of the laws is much retarded by the manner in which they are formed. It was well obſerved by Lord Bacon in the beginning of the laſt century, that the mandatory clauſe ought always to be placed at the beginning of the ſtatute; yet thoſe tedious preambles, which ſeem to have been derived from the ancient method of paſſing laws by petition, are ſtill retained, though frequently ill-connected with the ſubſequent parts of the law, to which they are prefixed. When the laws are imperfectly known, they are feared, not loved. For, when the people firſt learn the law by fatal experience, they feel as if the Judge was in effect the Legiſlator; and as if life and liberty were ſubjected to arbitrary controul: the idea of inſecurity is ſpread through the whole ſociety; and the ſenſe of

[z] Diſcebamus enim pueri duoecim tabulas, *ut carmen neceſſarium*; quas jam nemo diſcit. de Leg. 2. 23.

ſafety,

ſafety, in which political freedom is founded, ceaſes to exiſt. Upon the ſame principle the ſame will be the conſequences, where the law is imperfectly and indefinitely expreſſed. The ſtile therefore ſhould be clear, and as conciſe, as is conſiſtent with clearneſs; General terms alſo ſhould be particularly avoided, as liable to become the inſtruments of oppreſſion. Under the act 14 Geo. 2. c. 6. ſtealing ſheep "*or other cattle*" was made felony without benefit of clergy; but theſe general words "or other cattle" being conſidered as too vague to create a capital offence, the act was properly holden to extend only to ſheep.

§. 6. It hath been ſaid, that the dread of evil operates more forcibly on the mind than the expectation of good;[a] and *therefore*, that the ſanction of laws muſt conſiſt rather in penalties, than rewards.[b] But it may be offered perhaps as a more obvious reaſon for the eſtabliſhment of penalties, that obedience to the law is a matter of duty, demandable from the ſubject, and unneceſſary to be purchaſed by the allurements of gifts and privileges. Be

[a] Locke Hum. Underſt. B. 2. c. 21.

[b] Puffendorf, B. 1. c. 6. §. 4.

this as it may, evey law muſt have both a directory, and compulſory [c] part, and without the latter will be imperfect.[d] The wayward minds of the people muſt be deterred from diſobedience by the frightful images of pain and infamy.

It is unſafe to leave the meaſure of corporal puniſhment indefinite; but when ſhame only is the penalty, a greater latitude of expreſſion is admiſſible. If the penal ſyſtem were good, ſhame would be the certain conſequence of diſobedience to law. *Valeria Lex, quum eum qui provocaſſet, virgis cædi ſecurique necari vetuiſſet, ſiquis adverſus ea feciſſet, nihil ultra, quam improbe factum, adjecit: id (qui tum pudor hominum erat) viſum, credo, vinculum ſatis validum legis* [e]. Diodorus Siculus [f] pretends to have preſerved certain laws of Zaleucus, in which the puniſhment of infamy is implied in a manner ſtill more indeciſive.

" Let not a free woman, *unleſs ſhe be drunk*, " be attended by more than one ſervant. Let

[c] Which other writers expreſs by the word " *vindicatory*."

[d] Inter leges quoque illa imperfecta eſſe dicitur, in quâ nulla deviantibus pæna ſancitur. Macrob. L. 2. ca. 27.

[e] Liv. Hiſt. L. 10. c. 9. [f] Diod. Sic. L. 12. c. 20.

" her

" her not go forth from the city in the night,
" *unleſs when ſhe goes to proſtitute herſelf* to her
" Gallant. Let her not wear rich ornaments,
" or garments interwoven with gold, *unleſs ſhe*
" *be a courteſan.*"

The hiſtorian cites other laws of the ſame kind, and obſerves that they were attended by very beneficial effects.

It would be eaſy to purſue this ſubject to a very conſiderable length. I ſhall conclude however in the words of Lord Bacon [z].

" *Lex bona cenſeri poſſit, quæ ſit intimatione*
" *certa, præcepto juſta, executione commoda, cum*
" *formâ politiæ congrua, et generans virtutem*
" *in ſubditis.*"

CHAP. XXVII.

Of the Execution of penal Laws.

§. 1. SOLON is recorded to have ſaid, that he had accompliſhed his ſyſtem of laws, by coupling juſtice together with

[z] De Augm. Scient. Scient. L. 8. ca. 3.

ſtrength;[h] by which he meant to imply, that the legiſlative power would be of little avail without the aſſociated and effectual exertion of the executive. This Idea may be extended; and one may aſſert without the imputation either of cruelty or preſumption, *that the ſtrict execution of every unrepealed law is the part both of wiſdom and of mercy.*

It had better be ſaid, "*perquam durum eſt, "ſed lex ita ſcripta eſt*;" than "*lex ita ſcripta eſt, ſed non valebit.*" Cruel laws are ſuffered to exiſt, becauſe they are rarely enforced; for the ſame reaſon they are diſregarded by the people; and laws more cruel are made, becauſe thoſe already exiſting are found ineffectual.[i] Thus it is, that errors of the moſt fatal tendency are accumalated through many centuries; a truth, of which the conduct of criminal proſecutions in this country is a ſtriking example. The Engliſh courts of judicature have long been eminent for the extraordinary wiſdom and probity of the Judges.

[h] ὁμοῦ βίης τε, καὶ Δίκης συναρμόσας.
Plutarch Vit. Solonis

[i] A State ſo circumſtanced is well deſcribed by Tacitus, antehac flagitiis laboraſſe, nunc legibus.
Tacit. Annal. L. 3. c. 25.

Benevolence

Benevolence hath a natural prevalence in ſuch characters; but benevolence ceaſes to be a virtue, when it induces them to forget, that they are not authorized to interpret the penal laws; and that they are entruſted with the execution of them by a Legiſlature actually exiſting, and alone competent to ſuch interpretation.

If Larceny, when amounting in common apprehenſion to the value of twelve-pence, had regularly received the judgment of death according to law, a law ſo abſurd would not now exiſt; and Pilfering deſtined to a more adequate, but certain correction, would no longer be encouraged by the confidence of impunity. Many inſtances of a ſimilar kind have occured in the courſe of this work.

" In England, ſays Monteſquieu,[k] the ju-
" rors determine, whether the perſon accuſed
" be guilty of the crime ſubmitted to their
" inquiry; if he be declared guilty, the Judge
" pronounces the puniſhment inflicted by the
" law on that particular offence; and for this
" purpoſe it is only neceſſary for him to open

[k] L'Eſprit des Loix, L. 6. ch. 3.

" his eyes." The learned writer was only acquainted with the theory of Engliſh law.

§. 2. But let not theſe obſervations on the danger of impunity be miſapplied; they relate merely to the ſtrict conduct of tribunals in the courſe of proſecution and conviction; to that fixed, invariable adminiſtration of juſtice, which is beſt calculated to make the penal ſyſtem reſpectable. God forbid, that I ſhould confound the duty of the judge, which is to be directed by the letter of the law, with that prerogative of pardon, which reſides in the breaſt of the ſupreme magiſtrate; and which, when properly exerted, participates the beſt attribute of heaven. Yet it ſeems neceſſary to remark, that every diſproportionate ſeverity of the penal laws hath a tendency to familiarize the minds of princes to the exertion of this prerogative; and conſequently to lead them in many caſes to the abuſe of it. When ſuch inſtances happen, the rightful ſecurity of the people becomes a ſacrifice to the ſovereign. It hath been well ſaid, that " Clemency is a " virtue, which ought rather to reſide in the " code of laws, than in the private judgment " of any individual;" yet we muſt allow, that even in the mildeſt ſyſtems, of which human

ſocieties

ſocieties are capable, there will ſtill exiſt a neceſſity of this diſcretionary power, founded in the poſſible circumſtances of every conviction.

§. 3. The firſt ſtep towards the puniſhment of offenders is their formal accuſation. In all governments, which have any mixture of political freedoom, this accuſation ſhould, as in England,[1] be public. Private informers are the proper inſtruments only of deſpotic governments. Every idea of liberty and ſecurity is loſt, when the ends of juſtice are ſuffered to be ſought by ſuch means. It is the part of wiſe and moderate Legiſlators

[1] The firſt depoſitions before the Magiſtrate are generally taken in the face of the country; and the finding of the indictment by the Jury is ſtrictly in the nature of a public accuſation; for the names of the Witneſſes are indorſed on the Record, and ſo delivered into the Court, that they may be publicly examined, and confronted with the priſoner in the courſe of the tryal.

And here I ſhall digreſs in ſome meaſure from my ſubject to obſerve, that, though this accuſation tranſmitted to the Court is afterwards to be ſolemnly tried and determined; yet grand jurors ſhould remember always, that it is their duty to conſider fully the weight and credibility of the evidence laid before them; and that they are not authorized to expoſe a fellow-citizen to the ſhame, expence, and danger of a public trial, upon the vague ſuggeſtion of a mere probability.

anxiouſly to preclude [m] every poſſible avenue to falſe accuſation and calumny.

§. 4. In the proceſs ſubſequent to the firſt accuſation ſome delays are beneficial; (when Beccaria ſaid otherwiſe, he conſulted his own heart, and forgot the imperfections of mankind;) they are beneficial, becauſe a certain interval is neceſſary between the crime alledged and the trial, that popular prejudices may ſubſide into ſound reaſon; that judges may not be heated by the recent recollection of the fact; and that proſecutors may rather ſeek the ends of juſtice, than the gratifications of revenge. The enormity of the crime in queſtion ſhould be the meaſure of this interval. When the fact charged is very atrocious in its nature, a proportionable delay is requiſite; not only, that the firſt paſſion of the people againſt the offence may evaporate; but

[m] Yet it may be doubted, whether a wiſe and good writer did not uſe a very exceptionable, and dangerous latitude of expreſſion, when he ſaid that the falſe accuſer, ought to ſuffer the ſame puniſhment to which the perſon accuſed would have been expoſed in caſe of conviction. Ogni Governo, e republicano, e monarchico, deve al calunniatore dare lapena, che toccherebbe all accuſato.

Dei delitti e delle pene, §. 16.

An aſſertion, which, if reduced to practice, would prove a fatal check to all criminal proſecutions.

that

that a ſufficient time may be given for the preparation of proof on the part of the Public, and juſtification on the part of the Accuſed. Reaſon and the rights of humanity demand, that the ſtrength and ſtrictneſs of proof be increaſed in proportion to the enormity of the crime in queſtion. The more trivial delinquencies are leſs incredible in their nature, and leſs important in their conſequences both to the public, and the party; they are therefore proper for a more immediate diſcuſſion. But in neither caſe ſhould the interval be ſo great, as to deſtroy that promptitude of puniſhment, which is requiſite to make the ſufferings of the offender the apparent conſequence of his offence.

§. 5. I will not affirm that the ſame diſtinction ſhould be our guide as to the infliction of puniſhment after tryal and judgment. If the crime be of an inferior nature, it ſeems certain, that the puniſhment proportioned to it ſhould be immediately inflicted. We ought in ſuch caſes to ſpare the corroding torment of expectation, which can neither tend to the private amendment of the criminal, nor be exemplary to his fellow-citizens; and to promote, as much as poſſible that uſeful aſſociation

tion of ideas, which may check the frailty of the people, by holding out the image of unavoidable, and immediate puniſhment. The impreſſion of terror diminiſhes in proportion to the diſtance of the object.

But how far it may be proper to allow a longer interval, when a capital judgment is the conſequence of conviction, is a queſtion, on which it is difficult to reconcile the language of political utility with that of religion. The immediate execution of the criminal may poſſibly give a more ſalutary ſhock to the ſentiments of his fellow citizens, than the ſame horrid ſpectacle can produce, when the circumſtances of the crime are in ſome degree faded on the memory, and when compaſſion hath taken place of indignation; Yet what are the feelings of a ſerious mind at the ſight of a fellow creature thus cut off

"With all his crimes broad blown, as fluſh as May;
"And, how his audit ſtands, who knows, ſave heaven;
"But in our circumſtance, and courſe of thought,
"'Tis heavy with [a] him."

§. 6. There are certain poſſible contingencies relative to the criminal, which ſhould

[a] Shakeſpeare's Hamlet.

in

in all governments be admitted as good reaſons in ſtay of execution. Of this kind is the plea of infanity; in regard to which, the benevolence of the Engliſh law hath been already mentioned. The plea of pregnancy is alſo of this kind; though not admitted to operate ſo abſolutely in our law, as in the law of Egypt,[o] and of ancient Rome.[p] "If a woman (ſay the writers on the Engliſh law[q]) "hath once had the benefit of this reprieve, "and been delivered and afterward become "pregnant again, ſhe ſhall not be entitled to "the benefit of a further reſpite for this "cauſe." Such is the doctrine of our law, and uſe hath taught us to read it with tranquillity and indifference; though in truth no reaſon can be given as to the firſt reprieve, which will not apply equally to the ſecond.

§. 7. By the laws of the Romans[r] the Executioner was forbidden, not only to appear in the Forum, but even to have any habitation

[o] Diod. Sicul. L. 1. c. 77. [p] Ff. 48. 19. 8.

[q] "And when a woman commits high treaſon, and "is quick with child, ſhe cannot upon her arraignment "plead it, but ſhe muſt either plead not guilty or confeſs "it. She cannot alledge it in arreſt of judgment, but judg-"ment ſhall be given againſt her, and if it be found by an "inqueſt of matrons, that ſhe is quick with child, (for

"*privement*

in the City; and this was enacted, that the minds of the people might not be familiarized to the Idea of capital executions. Upon the ſame principle it was not unuſual to put the Malefactor to death in a ſecret dungeon, which was called Tullianum. It ſeems more adviſeable however on many accounts, that the puniſhment of death ſhould in every inſtance be publickly inflicted; and it is a certain proof of ſome defect in the mode of infliction, when it ceaſes to be conſidered as the moſt ſolemn and affecting ſcene, that can be exhibited.

" *privement enceint* will not ſerve) it ſhall arreſt and reſpite " execution till ſhe be delivered, *but ſhe ſhall have the benefit* " *of that but once, though ſhe be again quick with child.*
Co. 3. Inſ. pa. 17.

r " Carnificem non modo foro, ſed etiam cœlo hoc ac " ſpiritu, cenſoriæ leges, atque urbis domicilio carere " voluerunt." Cic. Orat. pro Rabir. ca. 5.

MVSEVM
BRITAN
NICVM

THE END.

ERRATA.

Page 21. lin. 7. for *Semediſſectio*, read *Serræ-diſſectio*.
22. Notes, lin. 4. for λυμαινεσθαι, read λυμαινεσθαι.
24. lin. 1. for *to their*, read *in their*.
36. lin. 14. for *chattels*, read *chattels only*.
☞ ibid. lin. 20. *The death* ſhould begin a new paragraph.
43. lin. 19. for *ſcelerio* read *ſceleris*.
58. Notes, lin. 1. for 3 *Juſt* read 3 *Inſt*.
61. lin. penult. for *falſus* read *faſſus*.
74. Notes, lin. 3. for ἔκλημα read ἔγκλημα.
103. lin. 12. for *of that of* read *of that*.
163. lin. 8. after *inſufficiencies* place a *colon*.
164. Notes, lin. 3. read *burgariter* and *burgulariter*.
169. Notes, lin. 4 for *hominum* read *hominem*.
192. lin. 18. for *detected* read *detecteth*.
201. Notes, lin. 2. read *criminelles condamnés a ſervir*.
210. lin. 15. for *portion* read *potion*.
216. lin. 13. for *inpoſing* read *interpoſing*.
219. lin. 7. for *circumſtances* read *circumſtance*.
221. lin. 16. for *communis* read *communio*.
230. lin. 11. for *membram* read *membrum*.
ibid. lin. 14. for *ulſciendi* read *ulſciſcendi*.
☞ 233. lin. 3. for *without* read *with*.
ibid. lin. 12. for *to be* read *or be*.
242. Notes, lin. for *natum* read *natam*.